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BOOK REVIEWS

Charlottesville, Virginia

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MILITARY LAW REVIEW

VOJUM 133 • 1993

MILITARY LAW REVIEW-VOLUME 139

The *Military Law Review* has been published quarterly at The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia, since 1958. The *Review* provides a forum for those interested in military law to share the products of their experiences and research and is designed for use by military attorneys in connection with their official duties. Writings offered for publication should be of direct concern and import in this area of scholarship, and preference will be given to writings that have lasting value as reference materials for the military lawyer. The *Review* encourages frank discussion of relevant legislative, administrative, and judicial developments.

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SUBSCRIPTIONS: Private subscriptions may be purchased from the Superintendent of Documents, United States Government Printing Office, Washington, D.C. 20402. Publication exchange subscriptions are available to law schools and other organizations that publish legal periodicals. Editors or publishers of these periodicals should address inquiries to the Editor of the *Review*.

Inquiries concerning subscriptions for active Army legal offices, other federal agencies, and JAGC officers in the ARNGUS not on active duty should be addressed to the Editor of the *Review*. The editorial staff uses address tapes furnished by the U.S. Army Reserve Personnel Center to send the *Review* to JAGC officers in the USAR; Reserve judge advocates promptly should inform the Reserve Personnel Center of address changes. Judge advocates of other military departments should request distribution from their service's publication channels.

CITATION: This issue of the *Review* may be cited as 139 MIL. L. REV. (number of page) (1993). Each quarterly issue is a complete, separately numbered volume.

POSTAL INFORMATION: The *Military Law Review* (ISSN 0026-4040) is published quarterly at The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia 22903-1781. Second-class postage paid at Charlottesville, Virginia and additional mailing offices. POSTMASTER: Send address changes to *Military Law Review*, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia 22903-1781.

INDEXING: The primary *Military Law Review* indices are volume 91 (winter 1981) and volume 81 (summer 1978). Volume 81 included all writings in volumes 1 through 80, and replaced all previous *Review* indices. Volume 91 included writings in volumes 75 through 90 (excluding Volume 81), and replaced the volume indices in volumes 82 through 90. Volume indices appear in volumes 92 through 95, and were replaced by a cumulative index in volume 96. A cumulative index for volumes 97-101 appears in volume 101, and a cumulative index for volumes 102-111 appears in volume 111. Volume 121 contains a cumulative index for volumes 112-121. Volume 131 contains a cumulative index for volumes 122-131.

Military Law Review articles are also indexed in *A Bibliography of Contents: Political Science and Government; Legal Contents (C.C.L.P.); Index to Legal Periodicals; Monthly Catalogue of United States Government Publications; Index to U.S. Government Periodicals; Legal Resources Index*; three computerized data bases, the *Public Affairs Information Service*, *The Social Science Citation Index*, and *LEXIS*; and other indexing services. Issues of the *Military Law Review* are reproduced on microfiche in *Current U.S. Government Periodicals on Microfiche*, by Infodata International Inc., Suite 4602, 175 East Delaware Place, Chicago, Illinois 60611.

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SUBMISSION OF WRITINGS: Articles, comments, recent development notes, and book reviews should be submitted, typed in duplicate, double-spaced, to the Editor, *Military Law Review*, The Judge Advocate General's School, **U.S.** Army, Charlottesville, Virginia 22903-1781 (hereinafter TJAGSA). Authors also should submit 5¼-inch or 3½-inch computer diskettes containing their articles in IBM-compatible format.

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Reprints of published writings are not available. Authors receive complimentary copies of the issues in which their writings appear. Additional copies are usually available in limited quantities. They may be requested from the Editor of the *Review*.

BACK ISSUES: Copies of recent back issues are available to Army legal offices in limited quantities from the Editor of the *Review*.

Bound copies are not available and subscribers should make their own arrangements for binding if desired.

REPRINT PERMISSION: Contact the Editor, *Military Law Review*, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia 22903-1781.

MILITARY LAW REVIEW

Volume 139

Winter 1993

MILITARY DEPARTMENT GENERAL COUNSEL AS “CHIEF LEGAL OFFICERS”: IMPACT ON DELIVERY OF IMPARTIAL LEGAL ADVICE AT HEADQUARTERS AND IN THE FIELD

LIEUTENANT COMMANDER KURT A. JOHNSON*

I. Introduction

*Order is Heaven's first law; and this confest, Some are
and must be greater than the rest.*

—Alexander Pope

The early 1990s have witnessed an unprecedented effort by forces within the United States Department of Defense (DOD) to designate the civilian general counsel of the military departments¹ as the “chief legal officers” of their respective departments. Each military department’s legal services are performed by a combination of military and civilian attorneys. These

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¹Military departments are the Department of the Army; the Department of the Air Force; and the Department of the Navy, which includes the Navy and Marine Corps.

separate organizations are headed, respectively, by the federal statutorily-designated judge advocate generals and the federal statutorily-designated general counsel. As compared with the military judge advocates generals, the civilian general counsel are of relatively recent origin. They are primarily a phenomenon of post-World War II DOD reorganization. As might be expected of any large bureaucracy, the general counsel and judge advocate general organizations historically have tended to expand and compete with each other for military department legal business. Until recently, however, a general understanding of the division of labor existed between the two organizations. This division of labor has been based on federal statute, DOD and military department regulation, areas of expertise, historic practice, and custom. Accordingly, the two organizations generally have operated as co-equals in their military departments—each organization predominating in its respective area of expertise and practice.

A. Background

Times have changed radically. The event that led to the current state of affairs was the inclusion of a legislative provision in the proposed 1992-93 DOD Authorization Act, sponsored by DOD and submitted to Congress by the administration of President George Bush. This provision would have designated the general counsel of the military departments the “chief legal officers” of their respective departments, and allowed the secretaries of the military departments to assign executive authority to their general counsel. The proposed legislation was scrutinized closely in Congress;² it also touched off a highly contested debate in DOD legal communities, which continues today.

The debate was rekindled on March 3, 1992, when the Deputy Secretary of Defense signed a memorandum applicable to all of the military departments that not only designated the general counsel of the military departments the “chief legal officers” of their respective departments, but also went far beyond the proposed legislation noted above. Specifically, it placed the general counsel in a hierarchical position superior to the judge advocate generals.³

²The Senate Armed Services Committee (SASC) and the House Armed Services Committee (HASC) are the two congressional committees having principal oversight responsibility and authority over Department of Defense affairs.

³The other major provisions of the memorandum included the following: (1) Making the general counsel subject to the authorities of both the secretaries of

Congress weighed in on the March 3, 1992 memorandum during the summer of 1992, primarily through a series of pointed questions to Mr. David Addington during his Senate confirmation hearings as the nominee for DOD General Counsel. The Senate Armed Services Committee (SASC)—concerned primarily with the potential impact on the “clients” of DOD lawyers—focused in on two key areas: assignment of executive authority to the military department general counsel, and diminished authority of the secretaries of the military departments. Mr. Addington’s answers to the questions satisfied the SASC, and the SASC exacted a promise from Mr. Addington to seek revision of the March 3, 1992 memorandum.

In response to the Addington confirmation hearings, the Deputy Secretary of Defense issued a new memorandum on August 14, 1992, which superseded the March 3, 1992 memorandum. This new, shorter memorandum contained two primary provisions: the general counsel of the military departments would be the “chief legal officers” of their respective departments, and their legal opinions would be controlling within their respective departments. As of this writing, and for the foreseeable future, the August 14, 1992 memorandum appears to be the “law” within the Department of Defense.

B. Goals

This article assumes that the DOD legal communities and the congressional committees tasked with overseeing DOD share the goal of effectuating the delivery of sound and impartial legal advice to decision-makers in the Office of the Secretary of Defense (OSD), decision-makers in the military departments, and military operational commanders. In other words, the common interest of these decision-makers⁴ presumably is to create and maintain a structure for providing legal services in the DOD that maximizes its contributions—and minimizes its hindrances—to achieving the

the military departments and the General Counsel of the Department of Defense; (2) Making the general counsel responsible for the uniform interpretation and application of laws and delivery of legal services within their respective departments; (3) Subjecting all civilian and military personnel performing legal duties within the military departments to the “authority” of the general counsel of their respective military department; (4) Charging the general counsel with ensuring that all civilian and military personnel performing legal duties within their respective military departments comply with statutory, regulatory, and ethical standards; and (5) Making the opinions of the general counsel the “controlling legal opinions” of their respective departments.

⁴These decision-makers are the Secretary of Defense, the secretaries of the military departments, the Department of Defense General Counsel, the general counsel of the military departments, the judge advocate generals, and the Senate and House Armed Services Committees.

military mission. Accordingly, this article will not dwell upon, nor speculate about, the personal political controversies that often appear to obscure the normative objectives of government. Rather, it will concentrate on attaining the best possible framework for providing legal advice as a functional adjunct to the nation's military organization.

This general goal has many component parts, or "subgoals," which this article will explore and discuss. These subgoals include the following:

- Preserve an independent military perspective in DOD decision-making.
- Locate legal expertise, authority, and accountability as close as possible to military operational commanders in the field.
- Encourage diverse points of view in delivery of legal advice to DOD decision-makers.
- Clarify who is the client of a DOD lawyer.
- Avoid conflicts of interest for DOD lawyers.
- Maximize strengths of DOD lawyers, and capitalize on their respective areas of expertise and training.
- Encourage teamwork and foster synergy among DOD civilian and military lawyers.
- Assign military and civilian lawyer roles in harmony with separate and distinct operational and administrative chains of command.
- Maximize the authority and discretion of military department secretaries within the bounds of the law.
- Structure DOD-wide legal services to best serve the military mission of fighting and winning wars.
- Structure the provision of legal services within each military department to serve its secretary most efficiently and effectively, and to serve the unique mission of each military department. Concomitantly, avoid artificial similarities among the military departments and the Department of Defense.
- Remove unnecessary layers of bureaucracy between providers and recipients of legal advice in DOD.

- Clearly define when and how a legal opinion becomes “final.”
- Insulate legal advice within the DOD from unlawful command influence and political agendas.
- Insulate the military justice system from the political process.
- Preserve and enhance the concept of accountability in the military.

This article first will explore the evolution of the relationship between the general counsel and the judge advocate general of each service and will examine in detail the unprecedented efforts of the early 1990s to functionally elevate the authorities of the general counsel. Based on this background, the article will explore whether Department of Defense legal services—and, in particular, the “chief legal officer” aspects—currently are structured in the best possible way to achieve the general goal, as well as its many component parts.

C. Scope

This article focuses heavily on the structure of legal services within the United States Navy.⁵ Although differences exist among the legal structures of the Army, Navy, Air Force, and Marine Corps,⁶ the issues bearing on the chief legal officer controversy in each service always are similar, and usually are identical. Accordingly, the analyses, conclusions, and proposed remedies apply generally to all the military departments.

D. Methodology

A clearer picture of where DOD legal services are headed will emerge with an understanding of where they have been. The initial focus of this article, therefore, will be on the historical origins, evolution, and roles of the judge advocate general and general counsel organizations. **An** important historical landmark is the Goldwater-Nichols Department of Defense Reorganization

⁵The author worked in the immediate office of the Navy Judge Advocate General from June 1990 to July 1992, garnering a unique and close-up view of Navy legal services.

⁶Each of the military department judge advocate generals is a two-star admiral or general. Although the Navy Judge Advocate General is the Judge Advocate General for both the Navy and the Marine Corps, the Marine Corps has a one-star general who is the “Staff Judge Advocate to the Commandant of the Marine Corps,” 10 U.S.C. § 5046 (1988), and therefore acts, in many respects, as the “Judge Advocate General of the Marine Corps.”

Act of 19867 (Goldwater-Nichols Act). In particular, the Goldwater-Nichols Act statutorily recognized the general counsel of the military departments and, in the case of the Department of the Navy, established both the Navy General Counsel and the Judge Advocate General, U.S. Navy, in the Office of the Secretary of the Navy.

The next section of the article will address the modern-day roles of the judge advocate generals and the general counsel as determined by federal statute, DOD and military department regulation, and practice. Additionally, it will look at attempts to refine and clarify the roles of the judge advocate generals and the general counsel through joint agreements and military department regulations. Examining the substance and intent of these attempts is helpful because they were precursors to the efforts of the early 1990s to designate the military department general counsel the chief legal officers of their respective departments.

As a final building block prior to analysis, part IV of this article will look in detail at the three major efforts in the early 1990s to designate the military department general counsel the chief legal officers of their respective departments. A study of these efforts is crucial because they represent perhaps the strongest attempts to redefine the roles of the judge advocate generals and the general counsel in the history of the Department of Defense. The heated debates generated by these efforts focused tremendous attention on military department legal organization. The fruits of this scrutiny are critical to understanding how best to ensure effective delivery of sound, impartial legal advice in the OSD, in the military departments, and to military operational commanders. Starting first with the Administration-proposed legislation contained in the 1992-93 DOD Authorization Act, part IV will analyze the DOD's rationale in attempting to procure executive authority and "chief legal officer" status for the military department general counsel. Next it will focus on the most far-reaching of the three proposals—the Deputy Secretary of Defense memorandum of March 3, 1992, the DOD's rationale behind it, and implementation of the memorandum's directives within the military departments. Finally, it will look at the congressional reaction to the March 3, 1992 memorandum, as illustrated by the Senate confirmation hearings for Mr. David Addington, nominee to be DOD General Counsel, and the ultimate replacement of the March 3, 1992 memorandum with a revised memorandum of August 14, 1992.

⁷Goldwater-Nichols Department of Defense Reorganization Act of 1986, Pub. L. No. 99-433, 100 Stat. 992 (1986) (codified as amended in scattered sections of 10 U.S.C.).

With historical background, current statutory and regulatory roles, and an understanding of the early 1990s efforts in hand, Part V of this article will analyze the current legal structures of the military departments, and gauge those structures in terms of their abilities to achieve the common goal of effective delivery of sound, impartial legal advice within OSD, in the military departments, and to military operational commanders. The analysis section is divided into three sections: statutory analysis, organizational analysis, and public policy analysis.

This study will close with a summary of conclusions reached, followed by a listing of legislative and administrative measures that may move the DOD closer to the common goal.⁸

11. Historical Background

A lawyer without history or literature is a mechanic, a mere working mason; if he possesses some knowledge of these, he may venture to call himself an architect.

—Guy Mannering

⁸**Others** rationally might choose a fundamentally different approach to this topic. This author has chosen to let history be the teacher by focusing initially on the organizational, legislative, statutory, and regulatory histories of the military department general counsel and judge advocate generals. The Principal Deputy General Counsel of the Department of Defense would approach the topic in a fundamentally different fashion. Interview with Mr. Paul Beach, Principal Deputy General Counsel, Department of Defense, in Washington, D.C. (Oct. 8, 1992). At the time of this interview, Mr. Beach was on leave of absence from the DOD General Counsel's office to work at the White House as Special Counsel to the President of the United States. Mr. Beach clarified that the views and opinions he expressed were strictly his own, and not those of the Department of Defense or DOD General Counsel.

Mr. Beach and this author agree that the ultimate goal of the military legal organization is to provide what he defines as "top quality legal services to the client." Mr. Beach, however, temporarily would set aside the organizational, legislative, statutory and regulatory histories, and would focus initially on the question, "Who is the client?" He believes that the type of structures that should be in place to achieve that goal depend largely on the answer to that question. Mr. Beach points out, for example, that existing legal structures in the military departments are not necessarily representative of what those structures *should* be. As a general principle, this author agrees with Mr. Beach's point, but would argue that focusing the inquiry on the issue of who the client is, as he proposes, will not provide a complete answer. Rather, this author asserts that a historical approach to the organizational, legislative, statutory, and regulatory schemes actually is necessary to answer the following questions, which are critical to this inquiry: What was Congress's intent? Why did military department legal structures evolve as they did? Which structures worked well, and which ones worked poorly? Which legal assets are the most effective—by design, training, and equipment—at meeting the various legal needs of the military department? What have hundreds of years of experience taught military legal decision-makers?

A. Origins of the Navy Judge Advocate General and the Navy General Counsel

Legal services in the Navy Department have had a varied history.⁹ Prior to 1864, the Navy Department had no official legal advisor. In that year, the Secretary of the Navy, without specific congressional authority, appointed a civilian as Solicitor for the Navy Department. The job was to end with the Civil War.¹⁰ In the following year, Congress passed an act creating the Office of the Solicitor and Naval Judge Advocate General.¹¹ This office was charged with closing matters relating to the War between the States and was extended for six years by annual appropriation acts. In 1871, it was transferred to the Department of Justice and was abolished in 1878.¹²

After a lapse of two years, during which the Secretary of the Navy appointed a naval officer as Acting Judge Advocate, Congress passed the act of June 8, 1880, which created the present Office of the Judge Advocate General of the Navy.¹³ Thereafter, until 1908, the Office of the Judge Advocate General functioned as the only legal office in the Navy Department. In that year, the Office of the Solicitor was created by a proviso in an appropriation act.¹⁴ Articles 12 and 13 of the 1909 Navy Regulations delegated to the

⁹A 1943 report by the Personnel Subcommittee of the Committee on Naval Affairs, United States House of Representatives, provides an excellent description of the early history of legal services in the Department of the Navy. See *The Reorganization of Procurement Procedures and Coordination of Legal Services in the Navy Department: Hearings Pursuant to H. Res. 30 Before the Subcomm. on Personnel of the House Comm. on Naval Affairs*, 78th Cong., 1st Sess. (1943).

"An Act to Revise, Codify, and Enact into Law, Title 10 of the United States Code, Entitled 'Armed Forces,' and Title 32 of the United States Code, Entitled 'National Guard': Hearings on H.R. 7049 Before a Subcomm. of the Senate Comm. on the Judiciary, 84th Cong., 2d Sess. 61 (1956) [hereinafter *Senate Hearings*].

¹¹13 Stat. 468. The duties and responsibilities of the 1865-1878 Solicitor and Naval Judge Advocate General are unclear because the act that created the position did not specify the authority of the individual holding the office. See *Senate Hearings*, *supra* note 10.

¹²20 Stat. 205.

¹³*Senate Hearings*, *supra* note 10, at 67. The act, which then appeared as 8 U.S.C. § 428, provided as follows:

The President of the United States is authorized to appoint, for the term of four years, by and with the advice and consent of the Senate, from the officers of the Navy or the Marine Corps, a Judge Advocate General of the Navy. And the office of the said Judge Advocate General shall be in the Navy Department, where he shall, under the direction of the Secretary of the Navy, receive, revise, and have recorded the proceedings of all courts-martial, courts of inquiry, and boards for the examination of officers for retirement and promotion in the naval service, and perform such other duties as have been performed prior to June 8, 1880, by the Solicitor and Naval Judge Advocate General.

¹⁴35 Stat. 218.

Office of the Solicitor jurisdiction over all matters pertaining to commercial law, and authorized the Solicitor to “render opinions on any matter or question of law when directed to do so by the Secretary of the Navy.” The Office of Solicitor was continued by successive appropriation acts until **1921**, when it was merged by administrative action with the Office of the Judge Advocate General.¹⁵ From **1921**, until **1942**, the Office of the Judge Advocate General essentially was the only legal “office” in the Department of the Navy. Sources other than the Office of the Judge Advocate General, however, provided legal advice to the department. For instance, some of the technical bureaus in the department occasionally maintained small staffs of civilian legal advisors, who were responsible to, and employed by, those bureaus.¹⁶

Prior to World War 11, Navy bureaus employed at least fifty-five civilian attorneys in contracts divisions. These attorneys were responsible only to their bureau chiefs. They performed procurement and other commercial legal duties for the bureaus and were wholly independent of the Judge Advocate General.

From **1940 to 1941**, sixteen attorneys were employed in the Office of the Under Secretary of the Navy. They advised then-Undersecretary James Forrestal on procurement and other commercial legal matters independently of the Judge Advocate General. These attorneys formed the nucleus of the Procurement Legal Division, which was established by the Secretary of the Navy on September **10, 1941**.

On December **13, 1942**, by directive of the Secretary of the Navy, the lawyers employed by the several Navy bureaus were placed under the professional supervision of the Procurement Legal Division. The Secretary assigned the division with exclusive cognizance for “all legal work in connection with procurement and property disposal, and related matters”¹⁷ The new Procurement Legal Division rapidly gained firm ground—primarily because of pointed criticism of the Office of the Judge Advocate General’s handling of commercial and contract matters by the Personnel Subcommittee of the Committee on Naval Affairs, and a desire to centralize and coordinate all commercial law policy.¹⁸

¹⁵*Senate Hearings, supra* note 10, at 68.

¹⁶*Id.* at 19.

¹⁷*Id.* at 55.

¹⁸The Personnel Subcommittee made the following comment:

... It is the opinion of this subcommittee that the difference [in which the Procurement Legal Division and the office of the Judge Advocate General perform their respective functions] is primarily attributable to divergent views as to the position an attorney occupies with

In 1944, under a directive of Secretary Forrestal, the name of the Procurement Legal Division was changed to the Office of the General Counsel for the Navy Department; that office continues to present day.¹⁹ In 1955, the Secretary of the Navy issued directives governing the respective roles of the Office of the Judge Advocate General and the Office of the General Counsel. These directives reiterated the "business and commercial law" roles of the General Counsel.²⁰ The Judge Advocate General, however, maintained cognizance over "military justice and military law ... and all legal duties and services throughout the

respect to naval procurement. The cardinal principle under which the Procurement Legal Division operates is that an attorney-client relationship exists between it and the procurement officials. Sound, substantive, "on-the-spot" legal advice is its criterion. On the other hand, the Judge Advocate General adheres to the philosophy that the lawyer occupies a minor role so far as naval procurement is concerned. Under this theory, the terms of contracts, etc., are matters for decision by non lawyer technicians, and it is the duty of the Judge Advocate General only to insure that the contracts comply as to form with existing regulations. The practical effect of this position could only be to subject the Government to contract provisions the onerous character of which was limited only by the conscience of the contractor and his unchecked counsel.

... [T]he Office of the Judge Advocate General stands ready to furnish advice on any question that is referred to it, but does not seek to keep informed on matters that warrant legal advice. ...

... [B]y placing all commercial law under one entity, centralization and coordination of policy would be achieved. The Procurement Legal Division has demonstrated that its personnel [are] more capable, that it is more aggressive in protection of the Navy's interest, and that it is in a better position (by reason of attorneys placed in each bureau) to render adequate legal advice.

Senate Hearings, *supra* note 10, at 47, 52.

¹⁹*Id.* at 55.

²⁰DEPT OF NAVY, SECRETARY OF THE NAVY INSTR. 5430.25, OFFICE OF THE GENERAL COUNSEL FOR THE DEPARTMENT OF THE NAVY; LEGAL SERVICES IN THE FIELD OF BUSINESS AND COMMERCIAL LAW (2 Feb. 1955), made the Office of the General Counsel responsible for the following:

(a) The acquisition, custody, management, transportation, taxation, and disposition of real and personal property, and the procurement of services, including the fiscal, budgetary, and accounting aspects thereof; excepting, however, tort claims and admiralty claims arising independently of contract, and matters relating to the naval petroleum reserves;

(b) Operations of the Military Sea Transportation Service, excepting tort and admiralty claims arising independently of contract;

(c) The Office of the Comptroller of the Navy;

(d) Patents, inventions, trademarks, copyrights, royalty payments and similar matters; and

(e) Industrial security.

Department of the Navy other than those specifically assigned to the General Counsel for the Department of the Navy”²¹

The 1955 Secretary of the Navy Instructions governed the assignment of responsibilities to the General Counsel and the Judge Advocate General until these directives were canceled and replaced in 1977 with new instructions issued by Secretary of the Navy Graham Claytor. A side-by-side comparison of the 1955 and 1977 instructions illustrates that, although the General Counsel retained the Navy’s core “business and commercial law” responsibilities, the balance of legal responsibility between the General Counsel and the Judge Advocate General had shifted rather dramatically toward the General Counsel.²² The substantive areas of the law assigned to the General Counsel included business and commercial law; patent law; personnel law for civilian employees of Headquarters, Department of the Navy, and—in coordination with the Judge Advocate General—personnel law for civilians assigned throughout the Department of the Navy; contract claims; and litigation involving these areas of the law.²³

Under the 1977 instruction, the Judge Advocate General maintained cognizance over all military justice and military legal services throughout the Department of the Navy that “[were] not provided by the General Counsel of the Navy.”²⁴ This limited realm contrasted with the language of the 1955 instruction, which gave the Judge Advocate General responsibility over “*all legal duties and services throughout the Department of the Navy other than those specifically assigned [by Secretary of the Navy Instruction] to the General Counsel*” In addition, the 1977 instruction assigned to the Judge Advocate General responsibility for litigation, to be shared with the General Counsel in cases designated by the Secretary as “of major and continuing concern to the Secretary”; civilian personnel law throughout the operating forces of the Navy and the shore establishment, in coordination with the General Counsel; and “supervision of legal services” within the Department of the Navy.²⁵

²¹DEPT OF NAVY, SECRETARY OF THE NAVY INSTR. 5430.27, RESPONSIBILITY OF THE JUDGE ADVOCATE GENERAL FOR SUPERVISION OF LEGAL SERVICES (21 Feb. 1955).

²²Among other provisions, DEPT OF NAVY, SECRETARY OF THE NAVY INSTR. 5430.25D, THE GENERAL COUNSEL OF THE NAVY; ASSIGNMENT OF RESPONSIBILITIES (1 Dec. 1977) [hereinafter SECNAV INSTR. 5430.25D], provided that the Department of the Navy General Counsel “is the principal legal advisor to the Secretary.”

²³*Id.* ¶¶ (3)(a)-(f).

²⁴DEPT OF NAVY, SECRETARY OF THE NAVY INSTR. 5430.27A, RESPONSIBILITY OF THE JUDGE ADVOCATE GENERAL FOR SUPERVISION OF CERTAIN LEGAL SERVICES ¶ 3 (1 Dec. 1977) [hereinafter SECNAV INSTR. 5430.27A].

²⁵*Id.* ¶¶ 4-6.

The 1977 instructions remain in effect. Along with the statutory and other regulatory provisions governing the roles of the Judge Advocate General and the General Counsel, the 1977 instructions provide the legal parameters within which the Judge Advocate General and General Counsel organizations function.

B. The Attempt to Designate the Navy Judge Advocate General as the Sole Legal Advisor

In memoranda dated April 25, 1941, and July 10, 1941, the Judge Advocate General of the Navy asserted that the act of June 8, 1880, was explicit in that "all of the legal business of the Navy Department shall be handled by the Judge Advocate General under the direction of the Secretary of the Navy."²⁶ The Procurement Legal Division vigorously and successfully challenged this assertion, arguing that the language of the 1880 statute was unclear; that the creation of the Solicitor's Office in 1908, without amending the 1880 statute, demonstrated that the Judge Advocate General's Office never was intended to be the only "lawyer" in the Navy; that the entire legal business of the Navy Department never had been handled by the Judge Advocate General; and that, until 1941, the incumbents of the Office of the Judge Advocate General neither had studied nor had practiced law.²⁷

In 1955, the House of Representatives passed Bill 7049 which, among other things, sought to redefine the role of the Judge Advocate General as "[p]erform[ing] duties relating to legal matters arising in the Department of the Navy as may be assigned to him."²⁸ An effort was underway, apparently led by the Navy Judge Advocate General, to amend the language to "[p]erform[ing] *all duties relating to legal matters arising in the Department of the Navy*."²⁹ This unsuccessful effort again was challenged vigorously by, among others, the first General Counsel of the Navy, and the General Counsel of the Department of Defense, who shrewdly quoted the following comments that the 1950 Navy Judge Advocate General made to the Navy Management Survey Board:

In my opinion the transfer of cognizance [over procurement and related legal matters to the Office of the General Counsel] resulted in greater efficiency. It certainly did not increase savings, but that was not because the new arrangements were not better—it was because the law work of the entire Navy Department

²⁶*Senate Hearings, supra* note 10, at 60.

²⁷*Id.* at 60.

²⁸*Id.* at 66.

²⁹*Id.* at 66 (emphasis added).

was many times greater than it had ever been before For that matter, the law work in the entire Naval Establishment of today is in a good many respects difficult to compare with the law work of 10 years ago. In 1939 we had what today seems like the one-horse organization. ... I have no hesitancy in stating my opinion that ... a consolidation [of cognizance of all legal matters under The Judge Advocate General] would not result in increased efficiency. The reasons for reassignment of the functions are as good today as they ever were. There is so much law work to be done and someone has to do it. I do not believe centralization is necessary or desirable. So far as I know, the various activities that were once in this office are now being administered efficiently. ... There is a very clear-cut line of demarcation between the cognizance of law matters now. There is no overlapping, there is no duplication, and there is no confusion.³⁰

C. Origins of the Army Judge Advocate General and General Counsel

The Army Office of The Judge Advocate General has the distinction of being the oldest statutory legal position in the United States, dating back to 1776.³¹ The current Office of General Counsel was established in 1950 as the "Department Counselor." The title of "Department Counselor" was changed to "General Counsel" in 1955 pursuant to Department of the Army regulation.³² In contrast to the Navy General Counsel, whose origins derived from the need for procurement and "business and commercial law" expertise, the Army Department Counselor was established with the primary mission of counselling on "political-legal matters,"³³ and to "act essentially as a personal advisor and legal troubleshooter for the Secretary" of the Army.³⁴ Not surprisingly, Army judge advocates today—unlike their Navy counterparts—are involved heavily in contracting and "business and commercial law."³⁵

³⁰*Id.* at 56.

³¹**Memorandum**, Chief, Procurement Law Division, to The Judge Advocate General, U.S. Army, subject: Legality of the General Counsel's Arrogation of the Statutory Functions and Responsibilities of The Judge Advocate General, at 3 (1 Oct. 1974).

³²**Memorandum**, General Counsel of the Army, to The Judge Advocate General of the Army, subject: Ensuring Execution of the Laws and Effective Delivery of Legal Services (14 May 1992) [hereinafter Haynes Memo].

³³*Id.* at 9.

³⁴*Id.* at 5 n.8.

³⁵*See, e.g.,* Thomas J. Feeney & Margaret L. Murphy, *The Judge Advocate General's Corps, 1982-1987*, 122 MIL. L. REV. 1 (1988).

Like the role of the Navy General Counsel, the role of the Army General Counsel has evolved and expanded dramatically since 1955. The current governing Army general order, issued by the Secretary of the Army, designates the Army General Counsel as "the legal counsel to the Secretary and the chief legal officer of the Department of the Army."³⁶ The incumbent Army General Counsel takes the position that, in accordance with this Secretary of the Army general order, the duties and responsibilities of the Judge Advocate General have been subjected to General Counsel oversight and supervision since 1975.³⁷

D. The Goldwater-Nichols Act of 1986

The Department of Defense Reorganization Act of 1986 (Goldwater-Nichols Act) established the Judge Advocate General of the Navy and the General Counsel of the Navy as components of the Office of the Secretary of the Navy.³⁸ Accordingly no statutorily mandated, single office is responsible for the handling of legal

³⁶Headquarters, Dep't of Army, Gen. Orders No. 17, Assignment of Functions, Responsibilities, and Duties Within the Office, Secretary of the Army ¶ 9 (28 May 1991). This order prescribes the following responsibilities of the General Counsel:

- a. Serving as counsel for the Department of the Army and as counsel to the Secretary and other Secretariat officials.
- b. Coordinating legal and policy advice to all other members of [Headquarters, Department of the Army].
- c. Determining the Department of the Army position on any legal question or procedure.
- d. Providing acquisition legal advice
- e. Providing final Army legal clearance on all legislative proposals and comments thereon of interest to the Department of the Army.
-
- g. Administering Department of the Army legal services.
- h. Providing technical supervision over and professional guidance to all Department of the Army attorneys and legal offices.
- i. Providing professional guidance and general oversight with respect to representation of the Department of the Army and protection of its interests in litigation and in all other legal proceedings.

³⁷Haynes Memo, *supra* note 32, at 7.

³⁸The codification of this act provides as follows:

The Office of the Secretary of the Navy is composed of the following:

- (1) The Under Secretary of the Navy.
- (2) The Assistant Secretaries of the Navy.
- (3) *The General Counsel of the Department of the Navy.*
- (4) *The Judge Advocate General of the Navy.*
- (5) The Naval Inspector General.
- (6) The Chief of Naval Research.
- (7) Such other offices and officials as may be established by

law or as the Secretary of the Navy may establish or designate.

matters within the Office of the Secretary of the Navy. The Office of the Secretary of the Army and the Office of the Secretary of the Air Force are structured differently. Neither The Judge Advocate General of the Army, nor the Judge Advocate General of the Air Force is statutorily designated as part of the offices of their respective secretaries, although the Army Judge Advocate General statutorily is designated as "legal advisor of the Secretary of the Army."³⁹ On the other hand, the general counsel of the Army and Air Force—like the Navy General Counsel—are statutorily designated as part of the offices of their respective secretaries.⁴⁰

The General Counsel of the Department of Defense is designated the "Chief Legal Officer" of the Department of Defense both by statute⁴¹ and by Department of Defense directive.⁴² No similar statutory provision designates any of the military department general counsel as the "chief legal officers" of their respective departments.⁴³ The General Counsel of the Navy was designated as

³⁹*Id.* § 3037(c)(1).

⁴⁰The Office of the Secretary of the Army is composed of the following:

- (1) The Under Secretary of the Army.
- (2) The Inspector General of the Army.
- (3) The Administrative Assistant to the Secretary of the Army.
- (4) *The General Counsel of the Department of the Army.*
- (5) The Inspector General of the Army.
- (6) The Army Reserve Forces Policy Committee.
- (7) Such other offices and officials as may be established by law or as the Secretary of the Army may establish or designate.

Id. § 3014(b) (emphasis added).

The Office of the Secretary of the Air Force is composed of the following:

- (1) The Under Secretary of the Air Force.
- (2) The Assistant Secretaries of the Air Force.
- (3) *The General Counsel of the Department of the Air Force.*
- (4) The Inspector General of the Air Force.
- (5) The Air Reserve Forces Policy Committee.
- (6) Such other offices and officials as may be established by law or as the Secretary of the Air Force may establish or designate.

Id. § 8014(b) (emphasis added).

⁴¹*Id.* § 139(b) ("The General Counsel is the chief legal officer of the Department of Defense. He shall perform such functions as the Secretary of Defense may prescribe").

⁴²Dep't of Defense, Directive 5145.1, General Counsel of the Department of Defense (DA&M) ¶ C (Dec. 15, 1989) ("The General Counsel, Department of Defense ... is the chief legal officer of the Department of Defense. ..." A DOD directive is the administrative equivalent of a military department secretary's instructions or general orders.

⁴³The Army, Navy and Air Force General Counsel enabling statutes contain the following identical language: "(a) There is a General Counsel of the Department of the [Army, Navy, Air Force], appointed from civilian life by the President, by and with the advice and consent of the Senate. (b) The General Counsel shall perform such functions as the Secretary of the [Army, Navy, Air

"the principal legal advisor to the Secretary" by Secretary of the Navy instruction in 1977. The Army General Counsel has been designated administratively as the "chief legal officer" of the Department of the Army since 1975. The Air Force General Counsel, at least since 1985, has been "the final legal authority on all matters arising within or referred to the Department of the Air Force, except those relating to the administration of military justice. . . ."44

111. Roles of the Judge Advocate Generals and General Counsel

Such hath it been—shall be—beneath the sun. The many must labour for the one.

—George Gordon Noel Byron

The current statutory and regulatory schemes give the judge advocate generals and general counsel distinct roles in the legal processes within their respective military departments. The statutory responsibilities of the judge advocate generals were well summarized by the incumbent Department of Defense General Counsel45 in a written response to the Senate Armed Services Committee preconfirmation hearing inquiry.46 Under this statutory

Force] may prescribe." 10 U.S.C. § 3019 (1988) (Army); *id.* § 5019 (Navy); *id.* § 8019 (Air Force).

⁴⁴Dep't of Air Force, Secretary of the Air Force Order 111.1, Functions and Duties of the General Counsel ¶ 1 (7 Aug. 1985) [hereinafter **SECAF** Order 111.11.

⁴⁵**Answers** by David S. Addington, nominee to be General Counsel of the Department of Defense, to written preconfirmation questions posed by the Senate Armed Services Committee (June 19, 1992).

⁴⁶**Mr.** Addington outlined those responsibilities as follows:

.... The responsibilities of the judge advocate generals established by statute are set forth in Chapter 47 of Title 10 of the United States Code (the Uniform Code of Military Justice) and Sections 3037, 5148 and 8037 of Title 10.

Chapter 47 of Title 10 (the Uniform Code of Military Justice) provides the following authorities and duties for the judge advocate generals (citations in parentheses):

- recommend assignment for duty of judge advocates (806)
- make frequent inspections in the field in the supervision of the administration of military justice (806)
- designate military judges of general courts-martial (826)
- certify the competence of trial counsel or defense counsel detailed for a general court-martial (827)
- receive records of trial and action from judge advocates in certain cases in which corrective action is not taken (864)
- receive records in cases subject to appellate review (865)
- establish a Court of Military Review and designate its chief judge (866)
- refer to the Court of Military Review certain cases of trial by court-martial (866)
- instruct a convening authority to take action in accordance with a decision of the Court of Military Review

scheme, the duties of the judge advocate generals focus heavily on military justice and criminal law, claims, and legal assistance—roles that many describe as the “core” functions of uniformed attorneys.

unless there is to be further action by the President, the Secretary concerned, the Court of Military Appeals, or the Supreme Court (866)

-order sent to the Court of Military Appeals for review cases reviewed by the Court of Military Review (867)

—instruct a convening authority to take action in accordance with a decision of the Court of Military Appeals unless there is to be further action by the President or the Secretary concerned (867)

-establish branch offices with any command in certain circumstances (868)

-examine the record of trial in cases of findings of guilty in which the accused does not waive or withdraw his right to appellate review, and modify or set aside the findings or sentence or both if any part of the findings on sentence is found to be unsupported in law or if reassessment of the sentence is appropriate (869)

—modify or set aside certain court-martial cases on the ground of newly-discovered evidence, fraud on the court, lack of jurisdiction, error prejudicial to the accused’s substantial rights, or appropriateness of the sentence (869)

—order rehearings or dismissal of charges in certain circumstances when he sets aside findings or sentence (869)

-order certain cases to the Court of Military Review (869)

-detail and direct military appellate counsel (870)

—receive and act upon petitions for a new trial on the grounds of newly discovered evidence or fraud on the court (873)

—remit or suspend the unexecuted part of a sentence when designated by the Secretary concerned to exercise that authority (874)

—serve on the Code Committee that conducts an annual comprehensive survey of the operation of the Uniform Code of Military Justice (946).

Section 3037 of Title 10 provides that the Judge Advocate General of the Army is the legal adviser [sic] of the Secretary of the Army and of all officers and agencies of the Department of the Army; shall direct the members of the Judge Advocate General’s Corps in the performance of their duties; and shall receive, revise, and have recorded the proceedings of **courts** of inquiry and military commissions. Section 5148 provides that the Judge Advocate General of the Navy **shall** perform duties as may be assigned to him; perform the functions and duties and exercise the powers prescribed in chapter 47 of Title 10; receive, revise, and have recorded the proceedings of **boards** for the examination of officers of the naval service for promotion and retirement; and perform other assigned duties. Section 8037 provides that the Judge Advocate General of the **Air** Force shall receive, revise, and have recorded the proceedings of courts of inquiry and military commissions and perform such other duties as the Secretary of the Air Force may direct. In addition to these responsibilities, the judge advocate generals have other responsibilities assigned by statute, including supervision of legal assistance programs (10 U.S.C. 1044) and claims settlement (10 U.S.C. 2733).

Id. answer to subquestion 30h.

The statutory roles of the judge advocate generals are complimented by the roles set forth in each military department's regulatory scheme. In the Navy, the role of the Judge Advocate General is defined further by Navy regulations to include "providing or supervising the provision of all legal advice and related services throughout the Department of the Navy, except for the advice and services provided by the General Counsel,"⁴⁷ and "providing legal and policy advice to the Secretary of the Navy on military justice, administrative law, claims, operational and international law, and litigation involving these issues. . . ."⁴⁸ The Navy Judge Advocate General's role is defined even further by Secretary of the Navy and Chief of Naval Operations Instructions. By Secretary of the Navy Instruction, the Judge Advocate General's supervisory role also covers "military law" and, in coordination with the General Counsel, civilian personnel law.⁴⁹ In addition, by Chief of Naval Operations instruction, the Navy Judge Advocate General has the duty "[t]o advise and assist the Chief of Naval Operations in formulating and implementing policies and initiatives pertaining to the provision of legal services within the Navy."⁵⁰ Functions in this area include "liaison . . . with other [Department of Defense] components, other Government agencies, and agencies outside the Government on legal service matters affecting the Navy. . . ." Finally, the Navy Judge Advocate General serves as the Chief of Naval Operations' "point of contact with operating forces and shore activity commanders to ensure consistency of legal policies, procedures, objectives, training and support."⁵¹

Unlike their uniformed counterparts, the roles of the general counsel for each of the military departments is set forth almost exclusively in the particular military department's regulatory scheme. The general counsel statutes state simply that these individuals "shall perform such functions as the Secretary of the [military department] may prescribe."⁵² By Navy regulation, the Navy General Counsel's role includes "business and commercial law, environmental law, civilian personnel law, real and personal property law, and patent law";⁵³ "procurement of services,

⁴⁷DEPT OF NAVY, UNITED STATES NAVY REGULATIONS § 0331(1)(a) (1990) [hereinafter NAVY REGS. 1990].

⁴⁸*Id.* § 0331(1)(c).

⁴⁹SECNAV INSTR. 5430.27A, *supra* note 24, ¶¶ 3, 5.

⁵⁰DEPT OF NAVY, CHIEF OF NAVAL OPERATIONS INSTR. 5430.48C CH-1, OFFICE OF THE CHIEF OF NAVAL OPERATIONS (OPNAV) MANUAL 09J-1, 0P-09J (22 June 1989) (Special Assistant for Legal Services) [hereinafter OPNAV INSTR. 5430.48C].

⁵¹*Id.* ¶¶ 4, 5.

⁵²10 U.S.C. § 3019 (1988)(Army); *id.* § 5019 (Navy); *id.* § 8019 (Air Force).

⁵³NAVY REGS. 1990, *supra* note 47, § 0327(1)(a).

including the fiscal budgetary and accounting aspects, for the Navy and Marine Corps";⁵⁴ and litigation involving these areas of the law.⁵⁵ The General Counsel's role is defined further by Secretary of the Navy instruction to include advising the Secretary and the civilian executive assistants on matters concerning contract claims and litigation.⁵⁶ Similarly, by Department of the Army general order,⁵⁷ the Army General Counsel's role includes coordinating legal and policy advice at the headquarters level; providing legal advice on acquisition law, legislation, and appropriations; administering department-level legal services, technical supervision, and guidance to all Army attorneys; and guiding and overseeing department litigation. Likewise, by Secretary of the Air Force order,⁵⁸ the Air Force General Counsel's role includes legal advice on procurement, acquisition, research and development, construction, family housing, environment, fiscal matters, communications, occupational safety and health, security assistance, and negotiation of international agreements,

The legislative history of the Goldwater-Nichols Act contains some interesting insight into the congressional view of the general counsel's role. One of the major goals of the Goldwater-Nichols Act was to eliminate duplication in military department headquarters staffs. Nevertheless, Congress saw distinct roles in the Office of the Secretary of the Navy for both the Navy Judge Advocate General and the Navy General Counsel. "While recommending the elimination of duplication, the Committee does see a continuing need for the General Counsel of the Navy as a *key assistant to the Secretary of the Navy, particularly on sensitive matters directly related to civilian control of the military.*"⁵⁹

While the statutory and regulatory language noted above delineates distinct roles for the Navy Judge Advocate General and the Navy General Counsel, their roles occasionally have overlapped—primarily in the areas of civilian personnel law, litigation, standards of conduct and government ethics, and environmental law.⁶⁰ Moreover, some overlap has resulted from

⁵⁴*Id.* § 0327(1)(b).

⁵⁵*Id.* § 0327(1)(c).

⁵⁶SECNAV INSTR. 5430.25D, *supra* note 22, ¶ 3(a), (e).

⁵⁷Gen. Orders No. 17, *supra* note 36, ¶ 9.

⁵⁸SECAF Order 111.1, *supra* note 44, ¶ 3.

⁵⁹S. REP. No. 280, 99th Cong., 2d Sess. 63 (1986), *reprinted in* 1986 U.S.C.C.A.N. 2168, 2231 (emphasis added).

⁶⁰"Although *United States Navy Regulations 1990*, see *supra* note 47, assigns environmental law responsibilities to the Navy General Counsel, the General Counsel traditionally has shared the responsibility with the Navy Judge Advocate

these officials' inevitable misunderstanding of their respective roles. Prior to the movement in the early 1990s to designate the general counsel the "chief legal officers" of their military departments, Navy officials made several attempts to update and clarify the roles of the Judge Advocate General and the General Counsel. With the exception of the 1990 Navy Regulations,⁶¹ these efforts were futile. For example, the "Joint Environmental Law Office" currently operates without any written memorandum of understanding (MOU) between the Judge Advocate General's office and the General Counsel's offices. In 1990, the Judge Advocate General and the General Counsel exchanged several draft MOUs, but none were satisfactory to both parties. In addition to such inevitable differences, the roles of the Judge Advocate General and General Counsel still are governed, in part, by fifteen-year-old Secretary of the Navy instructions. In 1988, the Judge Advocate General proposed a single Secretary of the Navy instruction that would have cancelled the 1977 instructions governing the provision of legal services in the Department of the Navy and would have updated the responsibilities of the Judge Advocate General and General Counsel. This instruction, however, never was signed. In 1989, the Navy General Counsel proposed a change to his 1977 governing instruction that would have included the language "principal legal advisor." The proposed change also was not signed. Again in 1990, the Judge Advocate General and General Counsel exchanged drafts of a single governing Secretary of the Navy instruction that would have updated their roles. Still, the parties could not reach agreement on the language of the instruction, and the effort died. This inability to find common ground—coupled with out-of-date instructions and a *de facto* expansion of the roles of general

General. The Navy has a joint Environmental Law Office, which is staffed by both judge advocates and attorneys who work for the General Counsel. The rationale for this joint office apparently is two-fold. First, the amount of environmental law work is sufficient to keep both staffs busy. Second, environmental law matters affecting the operating forces of the Navy—as opposed to the shore establishment—properly fall within the domain of the Judge Advocate General.

⁶¹Navy regulations are issued by the Secretary of the Navy, in accordance with the provisions of 10 U.S.C. § 6011, and govern all persons in the Department of the Navy. The following significant changes in the relationship between the Navy General Counsel and the Navy Judge Advocate General appeared in the updated version: (1) specifically enumerated the duties of the Judge Advocate General and General Counsel; (2) deleted the language from *Navy Regulations 1973* which stated that the "responsibilities of the General Counsel are not intended to infringe upon, or interfere with, the responsibilities of the Judge Advocate General for the administration of military justice and such other matters as may be assigned to that officer by statute or by the Secretary"; and (3) added language that the Judge Advocate General and the General Counsel will maintain "a close working relationship" with each other on all matters of common interest. Compare NAVY REGS. 1990, *supra* note 47, with DEP'T OF NAVY, UNITED STATES NAVY REGULATIONS (1973).

counsel in military department affairs—probably led, at least in part, to the efforts of the early 1990s to designate the general counsel the “chief legal officers” of the military departments.

IV. The Attempted Changes

We all know how Adam said to Eve: “My dear, we live in a period of transition.”

—Vida D. Scudder

A. Legislative Proposal

The draft fiscal year 1992 and 1993 Department of Defense Authorization Act bill proposed by the Department of Defense, and cleared by the Office of Management and Budget, contained four provisions relating to the General Counsel of the military departments.

1. *Assignment of Executive Authority.*—The proposed legislation would have authorized the secretaries of the military departments to assign executive authority to the general counsel. Specifically, it added general counsel to the list of officials to whom the secretaries of the military departments may assign such functions, powers, and duties as they consider appropriate.⁶² Had Congress adopted this provision, a military department general counsel—subject to the secretary’s control—could have exercised authority pursuant to his or her assignment of responsibility, rather than “by direction” of the secretary or as “acting secretary.”

2. *Succession to the Office of Secretary.*—The proposed legislation would have granted authorization for the general counsel to succeed to and perform the duties of the secretaries of the military departments. In particular, it would have inserted the general counsel into the order of succession to the position of Secretary of their respective military departments, adding the general counsel to the list of officials who could perform the duties of the Secretary in the event of a vacancy.⁶³ This provision

⁶²The pertinent part of the Navy provision states the following:

The Secretary of the Navy may assign such of his functions, powers, and duties as he considers appropriate to the Under Secretary of the Navy and to the Assistant Secretaries of the Navy. Officers of the Navy and the Marine Corps shall, as directed by the Secretary, report on any matter to the Secretary, the Under Secretary, or any Assistant Secretary.

10 U.S.C. § 5013(f) (1988).

⁶³In the Navy, for example, the existing order of succession to the position of Secretary is as follows: (1) Under Secretary of the Navy; (2) Assistant

most likely was modeled after a similar provision that places the general counsel of the Department of Defense in the line of succession to the position of Secretary of Defense.⁶⁴

3. Chief Legal Officer Designation.—The proposal would have designated the general counsel as the chief legal officers of the military departments.

4. Alignment of the Grade and Pay of the General Counsel.—The proposal would have aligned the pay and grade of each military department's general counsel with that of its assistant secretary.⁶⁵ Section 703 of the fiscal year 1989 National Defense

Secretaries of the Navy; (3) Chief of Naval Operations; (4) Commandant of the Marine Corps. The Navy General Counsel would have been put in the line of succession behind the Assistant Secretaries of the Navy.

⁶⁴Exec. Order No. 12787, 56 Fed. Reg. 517 (1992). Section I of this executive order provides, in pertinent part, that the order of succession shall be as follows:

1. Deputy Secretary of Defense.
2. Secretary of the Army.
3. Secretary of the Navy.
4. Secretary of the Air Force.
5. Under Secretary of Defense for Acquisition.
6. Under Secretary of Defense for Policy.
7. Under Secretary of Defense for Acquisition.
8. Director of Defense Research and Engineering, Assistant Secretaries of Defense, the Director of Operational Test and Evaluation, the Deputy Under Secretary of Defense for Policy, and the General Counsel of the Department of Defense in the order fixed by their length of service as permanent appointees in such positions.
9. Under Secretaries of the Army, the Navy, and the Air Force, in the order fixed by their length of service as permanent appointees in such positions.
10. Assistant Secretaries and General Counsels of the Army, the Navy, and the Air Force, in the order fixed by their length of service as permanent appointees in such positions.

Id. sec. I (replacing Exec. Order No. 12514, 50 Fed. Reg. 20,383 (1985), which did not list the general counsel of the military departments as potential successors to the position of Secretary of Defense) (emphasis added).

⁶⁵The language of the pertinent part of the draft bill is as follows:

SEC. 518. GENERAL COUNSELS OF THE MILITARY DEPARTMENTS

(1) Authorizing the Secretaries of the Military Departments to Assign Powers, Functions, and Duties to the General Counsels of the Military Departments

Sections 3013(f), 5013(f), and 8013(f) of title 10, United States Code, are amended by inserting "and General Counsel" after "Assistant Secretaries";

(2) Authorizing the General Counsels of the Military Departments Temporarily to Perform the Duties of the Secretaries of the Military Departments

Sections 3017, 5017, and 8017 of title 10, United States Code, are amended by inserting "and the General Counsel" after

Authorization Act made the offices of the service general counsel advice-and-consent positions. It also provided that they would be paid at the rate for level IV on the Executive Schedule even though these positions were listed in Title 5, United States Code, as being at level V on the Executive Schedule. Section 518 of the proposed legislation removed the general counsel from the list of Executive Schedule level V positions and placed them on Executive Schedule level IV. Accordingly, with a permanent shift from level V to level IV, the proposed legislation would have repealed the 1989 National Defense Authorization Act to the extent that it directed general counsel be paid at the rate of level IV.⁶⁶

The official rationale behind the legislative proposal was multi-pronged. In a letter to the Chairman of the Senate Committee on Armed Services,⁶⁷ the General Counsel of the Department of Defense set forth several reasons for the DOD's legislative proposal.

The purpose ... is to recognize and make formal the role of the general counsels as the senior legal officials in their respective departments in order to enhance consistency, efficiency and accountability in the provision of legal services ... [and to] give the service general counsels the same status within the military departments as the DOD general counsel has within the Department as a whole.

[Elach department or agency must have a single senior legal officer whose opinion is final within that department or agency. ... [T]here has to be a single attorney who is the final arbiter of a legal issue. ...

.... No one would propose having two service secretaries simultaneously guiding a military department. The same applies to counsel. The present

"Assistant Secretaries";

(3) Identifying the General Counsels as the Chief Legal Officers of the Military Departments

Sections 3019(b), 5019(b), and 8019(b) of title 10, United States Code, are amended by inserting "is the chief legal [sic] of the Department and after "Counsel".

(4) Establishing the military departments' General Counsel Positions at Level IV of the Executive Schedule.

⁶⁶Memorandum, F. Prochazka, Administrative Law Division, Office of the Judge Advocate General, Department of the Navy (Apr. 23, 1991).

⁶⁷Letter from Terrence O'Donnell, General Counsel of the Department of Defense, to Senator Sam Nunn, Chairman, Senate Committee on Armed Services (July 3, 1991) (discussing section 515 of the legislation proposed by the Department of Defense).

situation violates the most basic tenets of sound organizational alignment and accountability.

....

.... It advances and preserves the constitutional balance of civilian authority within the Department of Defense. ... [I]t will enhance the quality of the legal services provided within the military departments.⁶⁸

The concept of "accountability for legal advice and services" in the military departments received further support from the Secretary of Defense⁶⁹ and the Deputy Secretary of Defense.⁷⁰ The Deputy Secretary of Defense also added recognition of the general counsel positions in the military departments to the list of reasons. The Deputy Secretary noted, "It is important to recognize [the general counsel] position in the hierarchy of the military departments. This will help to ensure that laws and regulations are enforced and that the key role of these legal advisors receives appropriate visibility in the military departments."⁷¹

Of the four proposals contained in the draft legislation, Congress adopted only the proposal related to aligning the grade and pay of the general counsel with those of the assistant secretaries of the military departments.⁷² Nevertheless, the "chief legal officer" provision of the proposed legislation would appear again in the Deputy Secretary of Defense memoranda of March 3, 1992, and August 14, 1992.

⁶⁸*Id.* at 1-3.

⁶⁹Letter from Dick Cheney, Secretary of Defense, to Senator John Warner, Ranking Republican on the Senate Committee on Armed Services (June 13, 1991) (conveying Bush Administration's views on the House of Representatives' version of the National Defense Authorization Act for Fiscal Years 1992 and 1993 (H.R. 2100)).

⁷⁰Letter from Donald J. Atwood, Deputy Secretary of Defense, to Senator George Mitchell, Senate Majority Leader (July 26, 1991) (conveying the Bush Administration's views on the Senate version of the National Defense Authorization Act for Fiscal Years 1992 and 1993 (S. 1507)).

⁷¹Letter from Donald J. Atwood, Deputy Secretary of Defense, to Senator Sam Nunn, Chairman, Senate Committee on Armed Services (Oct. 18, 1991) (asking for Senator Nunn's support in elevating the general counsel to Executive Level IV).

⁷²No records indicate that Congress expressly rejected these provisions. The Army General Counsel is correct in highlighting The Judge Advocate General's *non sequitur* argument, which essentially averred that Congress's failure to enact the provisions indicated that body's dislike for them. See Haynes Memo, *supra* note 32, at 6 n.12. The judge advocate generals believed strongly that functions of the military department general counsel should remain *advisory*, rather than *executive* in nature. Additionally, no records indicate that Congress expressly rejected the "Chief Legal Officer" concept. The judge advocate generals were concerned that such a provision would lead to an integration of the offices of the military department general counsel and the offices of the judge advocate generals, would give the general counsel expanded roles in supervising the judge advocate generals, or would impede the judge advocate generals' direct access to their respective service secretaries and chiefs of staff.

B. Deputy Secretary of Defense Memorandum of March 3, 1992

The Department of Defense effort to change the relationship between the military department general counsel and judge advocate generals did not end with Congress's decision not to enact three of the four Administration-supported provisions in the **1991-1992** Defense Authorization Act. In many respects, the effort actually broadened and intensified. On **March 3, 1992**, the Deputy Secretary of Defense issued a memorandum⁷³ that—if put into effect—would have had the widest impact of the three efforts of the early **1990s** to define the relationships between the judge advocate generals and the general counsel. The memorandum stunned the uniformed legal community, not only because Congress recently had declined to enact similar provisions, but also because the judge advocate generals were excluded from the policy-making process that culminated in issuance of the memorandum.⁷⁴ The memorandum's preamble stated,

Among the chief duties of the Secretary of Defense and the Secretaries of the military departments is the faithful execution of the laws of the United States. Effective performance of that duty requires that the Department of Defense have a single chief legal officer and that each military department have a single chief legal officer. They should be responsible and accountable for proper, effective and uniform interpretation and application of the law and delivery of legal services. Section 139 of Title 10 of the United States Code provides that the General Counsel of the Department of Defense is the chief legal officer of the entire Department of Defense. As such, the General Counsel of the Department of Defense is responsible and accountable to the Secretary of Defense for and has the authority necessary to ensure uniform, proper interpretation and application of the law and delivery of legal services throughout the Department of Defense. The purpose of

⁷³**Memorandum**, D. Atwood, Deputy Secretary of Defense, to Secretaries of the Military Departments and General Counsel of the Department of Defense, subject: Ensuring Execution of the Laws and Effective Delivery of Legal Services (Mar. 3, 1992).

⁷⁴**See** Memorandum for Record by J. McLaurin ¶ 18 (Apr. 30, 1992) (describing a meeting between The Judge Advocate General of the Army and staff members of the House Armed Services Committee) [hereinafter McLaurin Memorandum]. The Department of Defense departed from its normal procedure in this case, in that the memorandum was not made available to the military departments for comment prior to its adoption—a process that the military commonly refers to as “staffing.” In particular, the memorandum was not “staffed” through service secretaries and the judge advocate generals. The judge advocate generals learned of the memorandum on the day it was issued—March 3, 1992.

this memorandum is to provide similarly for a single chief legal officer for each of the military departments within the Department of Defense.⁷⁵

The memorandum had the following specific directives:

(1) The General Counsel of the military departments shall be the *chief legal officers* of their respective departments, *responsible to and subject to the authorities* of the Secretaries of the military departments as the heads of the military departments and the *General Counsel of the Department of Defense as the chief legal officer of the Department of Defense*.

(2) The General Counsel of the military departments shall be responsible and accountable for *proper, effective and uniform interpretation and application of the law and delivery of legal services* within their respective departments.

(3) *Civilian and military personnel performing legal duties* with respect to organizations or functions under the jurisdiction of the Secretary of a military department shall be *subject to the authority of the General Counsel of that military department* with respect to the performance of those duties.

(4) *The General Counsel of the military departments shall ensure* that civilian and military personnel performing legal duties with respect to organizations or functions under the jurisdiction of the Secretaries of the military departments *comply with applicable statutory, regulatory, and ethical standards* of the legal profession in the performance of those duties.

(5) The legal opinions of the General Counsel of the military departments shall be the *controlling legal opinions* of their respective Departments.

(6) The General Counsel of the military departments, subject to the authority, direction and control of the Secretaries of the military departments, shall implement this memorandum in a manner *consistent with applicable law*. ...⁷⁶

As with the proposed legislation, several reasons were offered in support of the memorandum's directives, including "proper, effective and uniform interpretation of the law, ...

⁷⁵Memorandum, D. Atwood, *supra* note 73.

⁷⁶*Id.* ¶¶ 1-6 (emphasis added).

effective civilian oversight of legal services, ... clarifi[cation of] the role of the General Counsel of the military departments in light of the Goldwater-Nichols Act ...;”⁷⁷ and “faithful execution of the laws of the United States.”⁷⁸ Further insight into the motivating force behind the memorandum came from the nominee to be General Counsel of the Department of Defense. In a written response to preconfirmation hearing questions posed by the Senate Armed Services Committee about any specific instances involving failure to ensure execution of laws, ineffective delivery of legal services, or other circumstances leading to the issuance of the memorandum, the nominee was brief. He answered simply, “... the most recent former DOD General Counsel was concerned with instances involving the conduct of legal officers in relation to promotion boards and advice on financial transactions.”⁷⁹

The March 3, 1992 memorandum survived only until August 14, 1992, when it was replaced with a revised version. In the interim, each military department secretary followed the Deputy Secretary of Defense’s directive by implementing the March 3, 1992 memorandum within their respective departments.

Military department secretarial implementation came despite vigorous dissent from the three judge advocate generals, which centered in five areas.⁸⁰ First, the memorandum disregarded military department secretarial discretion to assign duties to subordinates and purported to establish a direct line of authority between the Department of Defense General Counsel and each military department general counsel. Second, the memorandum purported to alter the respective responsibilities of the general counsel and the judge advocate generals even though,

⁷⁷See Memorandum, C. Beach, Acting Department of Defense General Counsel, to General Counsel of the Military Departments, Judge Advocate Generals, and Staff Judge Advocate to the Commandant [of the Marine Corps], subject: Responses to Press Query Regarding the Deputy Secretary of Defense’s 3 March 1992 Memorandum on Legal Services (Mar. 24, 1992); see also Memorandum, T. O’Donnell, Department of Defense General Counsel, to the Deputy Secretary of Defense, subject: Ensuring Execution of the Laws and Effective Delivery of Legal Services (Mar. 3, 1992).

⁷⁸Memorandum, D. Atwood, *supra* note 73; see also Memorandum, T. O’Donnell, *supra* note 77.

⁷⁹Answers by David S. Addington, *supra* note 45, answer to subquestion 30c. The “promotion board” comment probably referred to instances involving Army, Navy, Air Force and Marine Corps officer promotion boards from which some perceived that members of the various judge advocate general’s corps rendered improper, “politically-influenced” legal advice. See Interview with Paul Beach, *supra* note 8.

⁸⁰See, e.g., Memorandum, J. Gordon, Judge Advocate General of the Navy, to the Secretary of the Navy, subject: [Deputy Secretary of Defense] Memorandum on Legal Services (Mar. 10, 1992). The Chief of Naval Operations and the Commandant of the Marine Corps—the two service chiefs in the Department of the Navy—endorsed the Navy Judge Advocate General’s position.

by statute, this discretionary authority rests with the military department secretaries. Third, the memorandum ignored the organizational framework established by Congress. Fourth, the memorandum altered the traditional relationships between military operational commanders and their uniformed lawyers. Finally, the memorandum could not be implemented consistent with the existing statutory roles of the judge advocate generals, despite language in the memorandum to the contrary.

Implementation of the memorandum by the military department secretaries blunted at least some of the fears of the judge advocate generals. The Secretary of the Navy was the first of the three to implement the memorandum,⁸¹ adopting fully the "chief legal officer" and "controlling legal opinion" provisions of the memorandum, but limiting the effect of the remaining provisions.

[T]he authorities of the General Counsel prescribed in paragraphs (2) [accountability for uniform interpretation and application of the law], (3) [personnel performing legal duties subject to General Counsel authority] and (4) [ensure compliance with statutory, regulatory and ethical standards] of [the memorandum] shall be construed and exercised as *oversight authorities which do not affect existing reporting or client relationships between judge advocates and the personnel and activities to which they provide legal services, or the statutory authority of the Judge Advocate General. This oversight authority may not be delegated. Specifically, neither [the Deputy Secretary of Defense memorandum] nor this memorandum creates any right or authority to appeal to the General Counsel from a decision or opinion of the Judge Advocate General or Staff Judge Advocate to the Commandant.*⁸²

On the other hand, implementation of the memorandum within the Department of the Army was relatively unusual. Citing Department of the Army general orders that reiterated the designation of the **Army** General Counsel as that department's chief legal officer,⁸³ the Secretary of the Army determined that the memorandum required no changes to the established organization for the delivery of legal services within the Department of the Army.⁸⁴ The

⁸¹Memorandum, Secretary of the Navy, to [the Navy] General Counsel and Judge Advocate General, subject: Legal Services (Mar. 27, 1992).

⁸²*Id.* ¶ 2 (emphasis added).

⁸³See Gen. Orders No. 17, *supra* note 36.

⁸⁴See Memorandum, Secretary of the Army, to the General Counsel of the Department of the Army and the Judge Advocate General [of the Department of the Army], subject: Ensuring Execution of the Laws and Effective Delivery of Legal Services (Apr. 1, 1992).

Judge Advocate General responded to the Secretary's "no change" implementation with great apprehension. In particular, The Judge Advocate General was concerned about the Secretary's interpretation of the general orders cited to implement the memorandum.⁸⁵ Those concerns essentially were shared by the Navy Judge Advocate General, who had the same apprehensions over his department's interpretation of the language of the Deputy Secretary of Defense memorandum. The Secretary of the Air Force implemented the memorandum in a manner similar to that of the Secretary of the Navy. The Air Force Secretary fully implemented the "chief legal officer" and "controlling legal opinion" provisions of the memorandum, while limiting the effect of the remaining provisions of the memorandum to "oversight authorities subject to the authority, direction and control of the Secretary of the Air Force."⁸⁶

Recommending signature of the memorandum was one of the final acts of the incumbent General Counsel of the Department of Defense, who retired within days of its issuance. Mr. David Addington, who would succeed to the position of General Counsel of the Department of Defense, concurred in the recommendation. Word of the Deputy Secretary of Defense memorandum of March 3, 1992 reached Capitol Hill quickly. Staff members of the Senate Committee on Armed Services took a keen interest in the memorandum, particularly because the new nominee to be General Counsel of the Department of Defense would have to be confirmed by the Senate. This heightened scrutiny of the relationships between the senior civilian and uniformed attorneys in the military departments set the stage for a showdown between the Senate and the Department of Defense over the viability of the March 3, 1992 memorandum.

C. The Addington Confirmation Hearings and the "Revised" Memorandum of August 14, 1992

President Bush nominated Mr. David S. Addington, then-Special Assistant to the Secretary and Deputy Secretary of Defense, to serve as General Counsel for the Department of Defense. In preparation for Senate confirmation hearings, Senator Sam Nunn, Chairman of the Senate Committee on Armed Services, requested that Mr. Addington provide advance written

⁸⁵See Memorandum, The Judge Advocate General of the Army, to the Secretary of the Army, subject: [Deputy Secretary of Defense] Memorandum of 3 Mar. 92—"Ensuring Execution of the Laws and Effective Delivery of Legal Services" (Apr. 20, 1992).

⁸⁶See Memorandum, Secretary of the Air Force, to the [Air Force] General Counsel and the Judge Advocate General, subject: Ensuring Execution of the Laws and Effective Delivery of Legal Services (June 24, 1992).

answers to a series of questions prior to the confirmation hearing. More than a third of these questions centered directly on the March 3, 1992 Deputy Secretary of Defense memorandum, giving an indication of the depth of the Senate's concern about the memorandum.⁸⁷

Mr. Addington's answers to those questions⁸⁸ satisfied Senator Nunn, and led directly to supersession of the March 3, 1992 memorandum by the August 14, 1992 memorandum. In answer to questions on the extent to which the memorandum expanded General Counsel authority, Mr. Addington made the following statement:

The Deputy Secretary of Defense memorandum of March 3, 1992. . . . *was not intended to and did not enlarge or diminish the authority of the General Counsel of the Department of Defense.* The authority of the DOD General Counsel was the same before and after its issuance.

I am not aware of any authority for the DOD General Counsel to direct a military department, or any element thereof, to establish, disestablish, reorganize, or reassign an organization or function within a military department, nor do I believe such authority would be necessary or desirable for the DOD General Counsel.

*I am not aware of any authority for the DOD General Counsel to direct a personnel management action with respect to a particular individual or group of individuals within a military department, nor do I believe that such authority would be necessary or desirable for the DOD General Counsel.*⁸⁹

Beyond requiring that the general counsel of the military departments be the chief legal officers of their departments and that their legal opinions be controlling within their respective departments, Mr. Addington asserted that the memorandum did not "constrain the authority of the Secretary of a military department to assign or reassign responsibilities or functions to or from an organization within that department or to determine which organization will be given primary responsibility for a function within that department."⁹⁰ Mr. Addington further stated

⁸⁷ See Questions for David Addington, Nominee to be General Counsel of the Department of Defense, enclosed with letter from Senator Sam Nunn to David Addington (June 15, 1992).

⁸⁸ Answers by David S. Addington, *supra* note 45.

⁸⁹ *Id.* answer to subquestion 30e (emphasis added).

⁹⁰ *Id.* answer to subquestion 30g.

that the memorandum did not provide authority for general counsel of military departments to issue orders involving the delivery of legal services or responsibilities of individuals outside the Office of General Counsel of their respective departments.⁹¹ As to the numerous statutorily enumerated responsibilities of the judge advocate generals, Mr. Addington stated that the memorandum did not provide

a basis for the General Counsel of a military department to direct the Judge Advocate General to perform these responsibilities in a particular manner; to reach a particular result on a question of law, finding of fact, or a matter of judicial discretion; or to exercise appeal authority over a decision by the Judge Advocate General.⁹²

Mr. Addington went on to contend that the memorandum did not preclude the judge advocate generals from providing timely advice, nor constrain the content of advice, to the secretaries of the military departments.⁹³

The key question posed by the Senate Armed Services Committee was, essentially, to what extent did the memorandum actually expand a military department general counsel's authority? Mr. Addington's answer to this question set the tone in which the revised memorandum of August 14, 1992 would be written.

With respect to the General Counsel of the Department of the Army, I understand that Department of the Army General Order No. 17 (May 28, 1991) provided authority to the General Counsel of the Department of the Army at least equivalent to that for which the Deputy Secretary's memorandum provided. With respect to the General Counsel of the Department of the Navy and the Department of the Air Force, however, *the military department regulations did not provide that the General Counsel was the Department's chief legal officer and that the General Counsel's legal opinions were controlling within their military departments.*⁹⁴

⁹¹*Id.* answer to subquestion 30h.

⁹²*Id.* Mr. Addington reiterated, however, that a general counsel's legal opinion would be the controlling legal opinion of the military department, and that asking the general counsel for a legal opinion on a matter on which the judge advocate general has rendered an opinion would not be tantamount to an "appeal" of the judge advocate general's opinion.

⁹³*Id.* answer to subquestion 30k.

⁹⁴*Id.* answer to subquestion 30i (emphasis added).

During confirmation hearings, Senator Nunn exacted from Mr. Addington a promise that the nominee would seek a revision of the March 3, 1992 memorandum. Specifically, this promise purportedly would assure Senator Nunn that the memorandum's language would be changed to comport with Mr. Addington's written answers to the preconfirmation questions. The nominee intimated that the March 3, 1992 memorandum already was consistent with his answers. He nevertheless conceded that others might not agree.⁹⁵

The Senate Armed Services Committee further demonstrated its high level of concern about the meaning and effect of the March 3, 1992 memorandum by taking the unusual step of requiring rescission or revision of the memorandum in language contained in its fiscal year 1993 National Defense Authorization bill. A provision in that bill stated, "Not later than 10 days after the date of the enactment of this Act, the Secretary of Defense shall rescind or revise the memorandum of the Deputy Secretary of Defense entitled 'Ensuring Execution of the Laws and Effective

⁹⁵ Senate Comm. on Armed Services, Transcript of "Nominations of David S. Addington, to be General Counsel of the Department of Defense, and Robert S. Silberman, to be Assistant Secretary of the Army for Manpower and Reserve Affairs; To Consider Certain Pending Civilian Nominations; to Consider Certain Pending Army and Air Force Nominations; And to Discuss, and Possibly Consider, Certain Pending Navy and Marine Corps Nominations 13-14 (July 1, 1992); *see also* Senate Comm. on Armed Services, National Defense Authorization Act for Fiscal year 1993, Report to accompany S. 3114, S. Rep. 352, 102d Cong., 2d Sess. 252 (1992). The pertinent dialogue between Senator Nunn and Mr. Addington was reported as follows:

Chairman Nunn: On March 3, 1992, Deputy Secretary Atwood issued a memorandum on the delivery of legal services which raised a number of questions about the relationship between the DOD general counsel and the service secretaries and about the relationships between the service General Counsels, the service secretaries and the Judge Advocate General.

Your response to the prehearing questions provided useful clarification on the roles of legal officers and their clients within DOD. Can you assure the committee that you will recommend to the Deputy Secretary a revision of that March 3 memorandum to ensure there is no conflict between that memorandum and the answers you provided to the committee?

Mr. Addington: Yes, Senator, I have already discussed that with Deputy Secretary Atwood. [The answers to] [q]uestion number 30 of the prehearing questions reflected what he intended to accomplish and did accomplish with the March 3 memorandum. Some questions were raised though that there could be, by others, a broader interpretation and it has been asked that we just simplify it, carefully tailor so it reflects what was in my prehearing questions clearly, to eliminate any confusion. Secretary Atwood said he would be happy to do that.

Senate Comm. on Armed Services, National Defense Authorization Act for Fiscal year 1993, Report to accompany S. 3114, S. Rep. 352, 102d Cong., 2d Sess. 252 (1992).

Delivery of Legal Services,' dated March 3, 1992."⁹⁶ Moreover, the Committee's report reflected three major concerns: (1) the creation of a "stovepipe" relationship between the Department of Defense General Counsel and the military department general counsel that would bypass the secretaries of the military departments; (2) the assignment of executive authority to the general counsel; and (3) the diminishment of military department secretarial authority.⁹⁷ Consequently, the Senate Armed Services Committee concerns, coupled with Mr. Addington's answers to the preconfirmation questions posed by the Committee, led inevitably to a supersession of the March 3, 1992 memorandum.

On August 14, 1992, Deputy Secretary of Defense Atwood, who at the time was "Acting" Secretary of Defense, issued the revised memorandum.

To assist in ensuring faithful execution of the law and effective delivery of legal services, the Secretaries of the military departments shall ensure that the *General*

⁹⁶S. 3114, 102d Cong., 2d Sess., § 910 (1992).

⁹⁷Senate Comm. on Armed Services, National Defense Authorization Act for Fiscal Year 1993, Report to accompany S. 3114, S. Rep. 352, 102d Cong., 2d Sess. 252-53 (1992).

While the committee understands the need for appropriate guidance, the committee has been concerned that the matter set forth in the Deputy Secretary's March 3 memorandum is susceptible to interpretations that could disrupt important working relationships within the Department of Defense. In particular, the memorandum is susceptible of an interpretation that would provide the *DOD General Counsel with specific management responsibilities for military department lawyers that would by-pass the service secretaries*. It is also susceptible to an interpretation that would *assign to the military department General Counsel specific management duties with respect to the diverse legal organizations within their departments*. If so interpreted, the memorandum could require the DOD and service General Counsel to undertake a range of specific duties that would diminish their ability to concentrate attention on important oversight responsibilities. Also, if so interpreted, the memorandum could diminish the ability of the service secretaries to organize the delivery of legal services within their departments in the manner that best meets the specific needs of each department.

Because the June 19 response from Mr. Addington provides vital clarifying information, it is imperative that the Deputy Secretary's March 3 memorandum be either rescinded or revised to ensure consistency with the material in the June 19 response. The committee recommends a provision that would direct the Secretary of Defense to either rescind or revise the March 3 memorandum. In doing so, the committee notes that nothing in this provision is intended to restrict either the DOD General Counsel or the service General Counsels in exercising any authority provided to them by the Secretary of Defense or the Secretary of the military department concerned under either current regulations or such future regulations as may be authorized by applicable law.

Id. (emphasis added).

Counsel of the military departments are the chief legal officers of their respective military departments and that the legal opinions of the General Counsel of the military departments are the controlling legal opinions of their respective military departments. The Secretaries of the military departments shall implement this memorandum in a manner consistent with statutes relating to the judge advocate generals of the military departments.

This memorandum supersedes the Deputy Secretary of Defense memorandum of March 3, 1992 entitled "Ensuring Execution of the Laws and Effective Delivery of Legal **Services**."⁹⁸

Each of the judge advocate generals was given an opportunity to comment on the revised memorandum. The Air Force Judge Advocate General stood alone in finding the revised memorandum acceptable.⁹⁹ The judge advocate generals of the Navy¹⁰⁰ and the Army,¹⁰¹ and the Staff Judge Advocate to the Commandant of the Marine Corps,¹⁰² however, found the revised memorandum objectionable.

The following table on page 35 is designed to assist the reader in understanding the major components of the three major efforts of the early 1990s, as described in detail above.

The reader should note that the term "chief legal officer," as it applies to the Department of Defense General Counsel—who is so designated by statute—is not defined by statute, or by the legislative history accompanying the statute. Discussions with staff members of both the House and Senate Armed Services Committees¹⁰³ disclosed that no general understanding or agreement

⁹⁸**Memorandum**, Acting Secretary of Defense, to the Secretaries of the military departments, subject: Effective Execution of the Law and Delivery of Legal Services (Aug. 14, 1992) (emphasis added).

⁹⁹**Memorandum**, Deputy Judge Advocate General of the Air Force, to the General Counsel of the Air Force (Aug. 12, 1992).

¹⁰⁰**Memorandum**, Judge Advocate General of the Navy, to the Secretary of the Navy, subject: Revised Memo on the General Counsels of the Military Departments (Aug. 14, 1992).

¹⁰¹**Memorandum**, The Judge Advocate General of the Army, to the General Counsel of the Army, subject: Revised Memo on General Counsels of the Military Departments (Aug. 13, 1992).

¹⁰²**Memorandum**, Staff Judge Advocate to the Commandant of the Marine Corps, to the Judge Advocate General of the Navy, subject: Revised Memo on the General Counsels of the Military Departments (Aug. 14, 1992).

¹⁰³**Interviews** with congressional staff members (Oct. 8, 1992). The author conducted interviews with four staff members—two from the Senate and two from the House of Representatives. By agreement, these interviews were informational only and conducted under a stipulation of nonattribution.

	1991 Legisla- tive Proposal	Mar. 3, 1992, Dep. SECDEF Memo	Aug. 14, 1992 Dep. SECDEF Memo
Allow Assignment of Executive Functions	Yes	No	No
Allow Succession to Position of Secretary	Yes	No	No
Designate as "Chief Legal Officer"	Yes	Yes	Yes
Subject to Authority of DOD General Counsel	No	Yes	No
Make Responsible for Uniform Interpretation and Application of Law	No	Yes	No
Give Authority Over Those Performing Legal Duties	No	Yes	No
Give Authority to Ensure Compliance With Statutory, Regulatory, and ethical Standards	No	Yes	No
Make Opinion the "Controlling Legal Opinion" Within the Military Department	No	Yes	Yes

exists on the import **or** definition of the term "chief legal officer." The Department of Defense Deputy General Counsel concurred that the term is not well **defined**,¹⁰⁴ but offered a three-part opinion of its meaning, within the Department of Defense. First, he noted that a legal ruling by the Department of Defense General Counsel is binding on the judge advocate generals and the military department general counsel. Second, he pointed out that the Department of Defense General Counsel has "leverage" over all of the legal resources of the Department of Defense—that is, he is empowered to call for and use any military department general counsel **or** judge advocate general asset. Third, he asserted that the Department of Defense General Counsel can "reach down and grab" any legal issue in any of the military departments that is of concern to the Secretary of Defense **or** the Department of Defense.¹⁰⁵

¹⁰⁴Interview with Mr. Paul Beach, *supra* note 8.

¹⁰⁵*Id.*

The meaning of the term "chief legal officer," as it applies to the military department general counsel—who are *not* so designated by statute, but are named as such by the August 14, 1992 memorandum and, in the case of the Army General Counsel, by Army general order¹⁰⁶—also remains unclear.¹⁰⁷ The term, however, almost certainly was borrowed from the Department of Defense General Counsel statute. Likewise, the three "chief legal officer" efforts of the early 1990s almost certainly were modeled after the description of the duties of the Department of Defense General Counsel.¹⁰⁸ Accordingly, the term "chief legal officer" of the military departments apparently means the same as the term "chief legal officer" of the Department of Defense.

The definition of "chief legal officer" provided by the Deputy General Counsel of the Department of Defense, therefore, should apply equally to, and would have the same three-part meaning in delineating the powers of, the military department general counsel. First, a legal ruling by the military department general counsel would be binding on that department's judge advocate general. This binding authority would arise under every circumstance, given the "controlling legal opinion" provision of the

¹⁰⁶ See Gen. Orders 17, *supra* note 36.

¹⁰⁷ The Judge Advocate General of the Army, in his commentary on the August 14, 1992 memorandum, urged that the meaning of term "chief legal officer" be clarified. See Memorandum, The Judge Advocate General of the Army, to the General Counsel of the Army, *supra* note 101, encl. 1. He suggested the following language:

As the chief legal officers of their military departments, the General Counsel shall act in an oversight capacity, focusing on issues of broad legal policy. This does not empower them to exercise executive authority to manage organizations or personnel outside their particular offices. Furthermore, it does not empower them to direct The judge advocate generals to reach a particular result on a question of law, finding of fact, or a matter of judicial discretion, or to exercise appeal authority over decisions by The judge advocate generals.

The Staff Judge Advocate to the Commandant of the Marine Corps, in his commentary on the August 14, 1992 memorandum, objected to use of the term "chief legal officer," versus "chief legal adviser [sic]." He noted, "... Section 101 of title 10, United States Code, defines the term 'officer' as a 'commissioned or warrant officer.' Subject memo, however, describes the 'General Counsel of the military departments [as the] ... chief legal officers of their respective military departments ...'" See Memorandum, Staff Judge Advocate to the Commandant of the Marine Corps, to the Judge Advocate General of the Navy, *supra* note 102, ¶ (3)(a) (emphasis added). Throughout title 10, especially in its command eligibility provisions and the Uniform Code of Military Justice, see 10 U.S.C. §§ 801-846 (1988), the word "officer" is a term of art connoting *legal authority that a civilian does not possess*. This is especially troublesome because, by law, general counsel are *civilians*.

¹⁰⁸ For example, the memorandum from D. Atwood of March 3, 1992, *supra* note 73, stated that "the General Counsel of the Department of Defense is the chief legal officer of the entire Department of Defense. ... The purpose of this memorandum is to provide similarly for a single chief legal officer for each of the military departments within the Department of Defense."

August 14, 1992 memorandum. Second, the military department general counsel would have direct influence over all of the department's legal assets, and would be empowered to use judge advocates or other judge advocate general resources for any purpose he or she deemed appropriate. Third, the military department general counsel would be empowered to assume control over any legal issue being addressed by the judge advocate general when the general counsel believed the issue was of concern to the department or the department secretary.

The terms "chief legal officer" and "controlling legal opinion" unquestionably imply relative authority of one entity over another. Although disagreements may arise over the degree of the authority that each term implies, the Department of Defense General Counsel model clearly indicates that this authority is robust. Cloaking military department general counsel with equal authority over their respective judge advocate generals would change the traditional relationship between these two officials dramatically. While custom and practice never wholly justify adhering to the status quo, a substantial change should be accompanied by substantial reason. Accordingly, the merit of such a tremendous redefinition of the roles of officials at the very top of the military departments' legal structures depends principally on whether the change promotes the common goal of providing sound, impartial legal advice within the military departments and to military operational commanders.

V. Analysis

To change and to improve are two different things.

—German Proverb

Making the military department general counsel the "chief legal officers" of their respective services and giving them the authority to issue their department's "controlling legal opinions" actually would greatly *hinder* the common goal of providing sound, impartial legal advice within the military departments and to military operational commanders. This change from the traditional structure of military department legal organizations not only would be incompatible with the wisely crafted balance of authority clearly provided for by statute, but also would have several negative impacts at the military services' headquarters and in the field.

A. Statutory Analysis

1. *The Goldwater-Nichols Act.*—*The* major restructuring of the Department of Defense accomplished by the Goldwater-Nichols Act

reinforced and clarified the longstanding differences between the operational chain of command and administrative command channels. Significantly, the Goldwater-Nichols Act mandated that the *operational* chain of command is to run from the President and the Secretary of Defense—that is, the national command authority—who communicate their orders, as authorized by the President, through the Chairman of the Joint Chiefs of Staff, to the commanders of the unified and specified commands and, finally, to the commanders of the service component commands. The *administrative* command channels, on the other hand, run from the President and Secretary of Defense, who communicate their directives to the service secretaries, to the service chiefs of staff, and finally to the commanders of service and component commands.¹⁰⁹ The Goldwater-Nichols Act, therefore, placed *operational* matters outside of the areas of responsibility of the military department secretaries. Congressional intent included *improving the quality and enhancing the role of professional military advice*, strengthening civilian control of the military, and reducing and streamlining bureaucracy.¹¹⁰

Making the military department general counsel the "chief legal officers" of their departments upsets this scheme. The secretaries of the military departments, as reinforced and clarified by the Goldwater-Nichols Act definition, are to operate exclusively within administrative command channels.¹¹¹ This definition effectively prevents a service secretary from influencing the operational orders entrusted to, and communicated through, the operational chain of command. The auspices of service secretaries are limited essentially to matters relating to "training, administering, and equipping"¹¹² the military forces. Moreover, even the policies of the service secretaries on these matters must be turned over to the *operational* chain of command for implementation by combat commanders. Likewise, subordinates who work directly for the service secretaries also operate exclusively in the administrative chain of command. By statutory direction, the general counsel of the military departments, who perform such functions as their service secretaries *prescribe*,¹¹³ fall into that category.

¹⁰⁹H.R. CONF. REP. NO. 824, 99th Cong., 2d Sess. 118 (1986), *reprinted in* 1986 U.S.C.C.A.N.2168, 2283.

¹¹⁰S. REP. NO. 280, 99th Cong., 2d Sess. 1, 2 (1986), *reprinted in* 1986 U.S.C.C.A.N.2169, 2170.

¹¹¹*But see* 10 U.S.C. § 3033(e)(2) (Army)(1988); *id.* § 5033(e) (Navy); *id.* § 5043(f)(2) (Marine Corps); *id.* § 8033(e)(2) (Air Force) (service chiefs of staff, who perform their duties as members of the Joint Chiefs of Staff, are to *inform* the secretaries of the military departments on military advice rendered by members of the Joint Chiefs of Staff concerning matters affecting their respective military departments).

¹¹²*See, e.g., id.* § 5013(b).

¹¹³*Id.* §§ 3019, 5019, 8019.

Unlike the general counsel, however, the judge advocate generals provide legal advice in both administrative and operational settings. The Judge Advocate General of the Navy, for example, is designated the “Special Assistant for Legal Services” to the Chief of Naval Operations. In this role, he or she supports the Chief of Naval Operations’ administrative role by acting as the Chiefs point of contact with operating forces to “ensure consistency of legal policies, procedures, objectives, training and support.”¹¹⁴ When the Chief of Naval Operations exercises his or her authority as a member of the Joint Chiefs of Staff—thereby entering the operational arena—the Chief still is accompanied by his or her “Special Assistant for Legal Services.” The Navy Judge Advocate General, therefore, directly advises the Chief of Naval Operations in his or her chief-of-staff role in the operational arena.¹¹⁵ Accordingly, the Navy Judge Advocate General’s advisory role is much broader than that of the Navy General Counsel, whose legal opinion—if not founded upon the military department secretarial role to “train, administer and equip”—falls outside of Goldwater-Nichols Act limitations and thereby effectively carries no authority.

In addition to their broad advisory roles, each of the judge advocate generals exercises military authority over worldwide networks of organizations providing legal services to the military operating forces. Furthermore, each judge advocate general’s corps has a cadre of “staff judge advocates,” who are uniformed attorneys working directly for military operational commanders, rather than under the command of their respective judge advocate generals. Each member of the operational command **structure**—including service chiefs in their capacities as members of the Joint Chiefs of Staff, commanders of unified and specified combatant commands, and commanders of service component combatant commands—relies heavily upon staff judge advocates for legal advice and guidance.

The general counsel of the military departments, as subordinates of the service secretaries, cannot exercise powers that the service secretaries themselves cannot exercise. Just as the Goldwater-Nichols Act clarified that service secretaries have no role in operational matters, it most certainly removed the general counsel from any advisory role in the operational arena. The superseded March 3, 1992 Deputy Secretary of Defense provision that purported to give the general counsel “authority” over officials

¹¹⁴OPNAV INSTR. 5430.48C, *supra* note 50, ¶ 5.

¹¹⁵Interview with Rear Admiral John E. Gordon, Judge Advocate General’s Corps, United States Navy, Judge Advocate General of the Navy, in Washington, D.C. (Sept. 11, 1992).

“performing legal duties” within the military departments clearly violated the Goldwater-Nichols Act—at least to the extent that the affected officials included staff judge advocates, who are assigned to operational commands and are accountable for the performance of their duties to members of the operational chain of command. The provision would have made a staff judge advocate’s legal advice on operational matters, such as the rules of engagement, subject to the authority of the military department general counsel. Consequently, even though the Goldwater-Nichols Act clarified that operational matters are outside the service secretaries’ areas of responsibility, the March 3, 1992 provision purported to give the military department general counsel direct authority over the content of operational legal advice.

The “chief legal officer” provisions of each of the three early 1990s efforts, and the “controlling legal opinion” provisions of the two memoranda cannot survive Goldwater-Nichols Act scrutiny to the extent that they involve the military department General Counsel in operational matters. The general counsel of the military departments simply have no role in the operational arena. Accordingly, the August 14, 1992 memorandum—to the extent it purports to give such a function to the general counsel—is incompatible with the intent of the Goldwater-Nichols Act.

Another critical aspect of the Goldwater-Nichols Act bears directly on whether civilian general counsel should be the “chief legal officers” of the military departments. To the extent that any of the early 1990s efforts attempted to integrate the military staff of the judge advocate generals and the civilian staff of the general counsel, they ran counter to the intent of Congress in enacting the Goldwater-Nichols Act. Congress was interested in eliminating duplication in the headquarters staffs of the military departments, but expressly rejected full integration of the military and civilian staffs. The congressional intent was to continue the existence of “separate military headquarters staffs [to] ensure that defense decision making is assisted by independent and well-developed military perspectives.”¹¹⁶ As to the specific question of maintaining separate military and civilian legal staffs within the military departments, the Department of Defense strongly supported the concept that creating the statutory position of general counsel within the military departments did not eliminate the need for a separate military legal advisor with direct access to each of the service secretaries. For example, then-Secretary of the Army Marsh testified in Senate hearings as follows:

¹¹⁶H.R. CONF. REP. NO. 824, 99th Cong., 2d Sess. 151 (1986), *reprinted in* 1986 U.S.C.C.A.N.2168, 2316.

I ... disagree with having the general counsel directly supervise the Judge Advocate General. The general counsel is my senior legal advisor on matters concerned with civilian oversight while the Judge Advocate General advises the Chief of Staff and through him, myself on legal matters of the military to include administration of military justice. It is important that those two posts remain separate.¹¹⁷

The legislative history of the Goldwater-Nichols Act reveals the general congressional intent to eliminate duplication in military department headquarters staffs. That act, nevertheless, manifested a specific intent to maintain separate judge advocate general and general counsel staffs in the military departments—at least in the Navy.¹¹⁸ Congress apparently recognized that combining these two staffs would limit or inhibit the independent military perspective¹¹⁹ of the judge advocate generals, thereby potentially placing the attorney's interests above the client's interests. No such potential exists in the Department of Defense, which has no judge advocate general. In the case of a military department headquarters staff, however, the secretary is the mutual client of both the general counsel and the judge advocate general.

Not surprisingly, all three of the efforts of the early 1990s efforts to designate the general counsel of the military departments the "chief legal officers" of their respective departments originated in the Department of Defense, rather than in any of the military departments. Presumably, had the Secretary of the Navy, for example, believed that he would be served better by making the Navy General Counsel "chief legal officer," he would have initiated this change himself.¹²⁰ Then-Secretary of the Navy,

¹¹⁷*Reorganization of the Department of Defense: Hearings Before the Senate Comm. on Armed Services*, 99th Cong., 1st Sess. 585, 592 (1985) (testimony of Secretary of the Army J. O. Marsh, Jr.). (Other Department of Defense officials testifying included Secretary of Defense, W. H. Taft IV; Secretary of the Navy, J. Lehman; Under Secretary of the Air Force, E. C. Aldridge, Jr.; Chief of Naval Operations, Admiral J. D. Watkins; Army Chief of Staff, General J. A. Wickham; Air Force Chief of Staff, General C. A. Gabriel; and Commandant of the Marine Corps, General P. X. Kelley).

¹¹⁸See *supra* note 61.

¹¹⁹A subsequent section of this paper will discuss the "military perspective" in depth, and demonstrate its value to the decision-maker as well as the unique ability of the judge advocate generals to provide it. See *infra* part III.C.

¹²⁰This is hardly a new issue. In the 1950s, an effort arose to integrate and centralize the legal services of the military departments under a single lawyer who would have final authority over all legal services within his department. The Army reacted strongly.

It is the view of the Army staff that this entire theory is faulty and, accordingly, that all the recommendations based on it are undesirable. This theme of the Report places the attorney's interests

H. Lawrence Garrett III, was no stranger to the legal world. A lawyer himself, he was retired from the Navy Judge Advocate General's Corps, and had served as General Counsel of the Department of Defense. Clearly, he understood the system, possessed the authority, and was eminently qualified to make such a judgment. Accordingly, that he chose *not* to make the Navy General Counsel that department's "chief legal officer"—until the March 3, 1992 memorandum required him to do so—is significant.

The Goldwater-Nichols Act design to preserve the independent military perspective in DOD decision-making is disturbed when any type of filter or "gate guard is placed between a judge advocate general and the service's secretary. In responding to this concern, as expressed by The Judge Advocate General of the Army, the Army General Counsel stated,

Along similar lines, The Judge Advocate General has referred to the prospect of a loss of opportunity for him to express his opinion. Nothing in the Deputy Secretary's memorandum or the Secretary of the Army's General Orders inhibits such expressions. His advice will continue to be sought and welcome. The Judge Advocate General and members of the Judge Advocate General's Corps are an essential part of the Army legal community and must remain so. In fact, when advising clients, lawyers should strive to lay out the credible possible applications of the law to the facts, express their views of the best interpretation, and then provide counsel as to appropriate courses of action. *As the chief legal officer of the Army, and as charged by the Secretary, the General Counsel is responsible for ensuring that the Secretary is provided such services. This responsibility encompasses seeking the views of other legal officers of the Department, including the Judge Advocate General, especially when those other officials have special expertise, responsibility, or experience which bears on a matter.*¹²¹

This position, however, runs counter to the congressional intent manifest in the Goldwater-Nichols Act, and underscores the fear

above the client's interest, a reversal of the traditional and proper attorney-client relationship. It would build up a monolithic bureaucracy of governmental attorneys each of whom would report to and be primarily responsible to and directed by some other attorney all the way up to the Attorney General. In its concern for the lawyer, the Commission has lost sight of the client.

Department of the Army Comments Upon A Report to the Congress, March 1955, on Legal Services and Procedure of the Commission on Organization of the Executive Branch of the Government ¶ (2)(a) (n.d.).

¹²¹Haynes Memo, *supra* note 32, at 10 (emphasis added).

of the judge advocate generals. As the Army General Counsel views his “chief legal officer” role, *he* is responsible for ensuring that the Secretary of the Army receives proper legal services; *he* is to decide when those services call for input from The Judge Advocate General; and *he* is to gauge and judge the relative “expertise, responsibility, or experience” of The Judge Advocate General on a particular matter. This view begs the question, How can DOD decision-making benefit from the ‘independent and well-developed military perspectives’ if the civilian general counsel is free to decide whether the service secretary actually will hear that perspective?

Had Congress intended for the judge advocate generals to work directly under the supervision of their department’s general counsel, the language of the statutes would have been quite different. For example, 10 U.S.C. § 5148, would have been drafted to read “the Judge Advocate General of the Navy, *under the direction of the General Counsel of the Navy*, shall” Congress, however, was wise in its restructuring of the military department staffs to, among other things, avoid conflicts of interests that otherwise could arise. For example, under the provisions of the superseded March 3, 1992 memorandum, the military department general counsel would have been responsible and accountable to the Department of Defense General Counsel for “proper, effective and uniform interpretation and application of the law.” Accordingly, the “chief legal officer” provision of the memorandum arguably would have subjected the two principal sources of legal advice to the Secretary of the Navy—to whom both the Judge Advocate General and General Counsel report directly for matters under their cognizance—to inherent conflicts of interest. The Navy Judge Advocate General’s perspective, to the extent it reached the Secretary, would have been filtered through the Navy General Counsel, who was additionally accountable to the Department of Defense General Counsel.

Consequently, the single “chief legal officer” concept simply runs afoul of the congressional intent of the Goldwater-Nichols Act, one of the plain objectives of which was to provide Department of Defense decision-makers with uninhibited advice from a variety of sources, each acting within a particular area of expertise. Similarly, the statutory structure reflects that Congress intended a partnership between the military department judge advocate generals and general counsel, as opposed to a superior-subordinate relationship.¹²² This partnership concept was expressed well by the

¹²² McLaurin Memorandum, *supra* note 74, ¶ 11. One of the professional staff members of the House Armed Services Committee, in a meeting with The Judge Advocate General of the Army on April 30, 1992, made the following comment:

[T]he [Goldwater-Nichols Act] conferees rejected a proposal to

Honorable Susan Crawford, currently a judge for the Court of Military Appeals, and formerly the Inspector General for the Department of Defense and General Counsel for the Department of the Army. The following comments were made while Judge Crawford was General Counsel for the Department of the Army:

... I have often said that there is more than enough legal business in our Army to go around, and I am more than happy to share that business. I believe that we serve our clients best when we put aside parochial or turf interests and look instead to the greater good of the Army, the Defense Department, and our nation.

[T]he role I see for all of us as Army lawyers is like that of an extended family. We may have different homes, different specific missions, and different perspectives, but we all share a common heritage. ...

And we all share a common goal—providing the Army the best legal advice possible. In providing this advice, we are called upon to provide each other mutual support, rather than parochial perspectives. We are called upon to provide unity of effort, rather than organizational turf battles.¹²³

2. Authority of the Deputy Secretary of Defense as it Relates to Statutory Functions of the Judge Advocate Generals.—Although the legislative attempt to designate the general counsel of the military departments the “chief legal officers” of their respective departments ultimately failed, the Deputy Secretary of Defense actions of March 3, 1992, and August 14, 1992, designated the general counsel as “chief legal officers” by administrative memorandum. An important issue, however, is whether the Secretary of Defense, or a subordinate acting at his or her direction, possesses the legal authority to make such a change to the structure of legal services within the Department of Defense.

Clearly, the Secretary of Defense possesses broad authority to supervise the Department of Defense and administer its

integrate the legal staffs and to make [the judge advocate generals] directly subordinate to the [General Counsel] ... the legal staffs' functions were not considered directly. The expectation at the time was that a *partnership between the [General Counsel] and the [judge advocate generals] would continue to exist, each having separate avenues of approach to the Service Secretaries*. Both [Goldwater-Nichols Act] Reports and the House Bill had that language, but the final Bill did not contain the language. At the time, they did not really think it was necessary to have the language.

(emphasis added).

¹²³Susan Crawford, Opening Remarks for the General Counsel's Conference, June 1988, reprinted in *ARMY LAW*, July 1988, at 13-14.

functions. Congress, however, carefully has placed the following limits on the Secretary of Defense's power in this area:

[T]he Secretary of Defense shall take appropriate action (including the transfer, reassignment, consolidation, or abolition of any function, power, or duty) to provide more effective, efficient, and economical administration and operation, and to eliminate duplication, in the Department of Defense. *However, except as provided by subsections (b) and (c), a function, power, or duty vested in the Department of Defense, or an officer, official, or agency thereof, by law may not be substantially transferred, reassigned, consolidated, or abolished.*¹²⁴

By its plain language, this statute prohibits the Secretary of Defense, without congressional approval, from substantially transferring or reassigning any statutory functions of the judge advocate generals to the general counsel of the military departments, and from substantially consolidating any of those functions under the general counsel. Therefore, to the extent that the memoranda of March 3, 1992, and August 14, 1992, substantially transfer or reassign to the general counsel—or substantially consolidate under the general counsel—the statutory functions of the judge advocate generals, these documents exceed the statutory authority of the Secretary of Defense.¹²⁵

¹²⁴ 10 U.S.C. § 125 (1988) (emphasis added). This statute also addresses situations involving hostilities or imminent threat of hostilities, *see id.* § 125(b), and the development and operational use of weapons systems, *see id.* § 125(c).

¹²⁵ The then-Army General Counsel took the position that the statutory functions of the Army Judge Advocate General have not been transferred or reassigned.

While it is true that 10 U.S.C. § 125 prohibits the substantial transfer of functions vested by law, the functions, if any, that may be gleaned from 10 U.S.C. § 3037(c)(1) & (2) have *not* been transferred or reassigned, but simply have been subjected—for the past 17 years—to oversight and supervision. The Deputy Secretary's memorandum does not divest The Judge Advocate General of his responsibilities, nor do the Secretary of the Army's General Orders. That The Judge Advocate General executes his responsibilities subject to the supervision and oversight of the General Counsel is no more a divestiture of the former's duties than is caused by supervision and oversight in varying degrees by the Secretary, the Under Secretary, the Chief of Staff, the Vice Chief of Staff, and the Director of the Army Staff.

Haynes Memo, *supra* note 32, at 7 (footnotes omitted). The Army General Counsel basically is stating that, because the *Army* Secretary—as opposed to the Secretary of Defense—previously had chosen to designate the Army General Counsel the “chief legal officer” of the Department of the Army, the memorandum effectively transfers no functions. If this is true, the Army General Counsel's statement implies that the memorandum may violate 10 U.S.C. § 125 in the case of the Navy and Air Force, whose general counsel previously had *not* been designated “chief legal officers.”

The August 14, 1992 memorandum is the current "law" within the Department of Defense. Consequently, its "chief legal officer" and "controlling legal opinion" provisions are most relevant to this discussion. Unless one considers these two provisions, standing by themselves, as utterly meaningless, they almost certainly violate the limits Congress placed on the authority of the Secretary of Defense.

The most obvious example of an area in which this memorandum violates congressionally imposed limitations on the Secretary of Defense's authority concerns the extensive military justice duties assigned by statute to the judge advocate generals. Under the Uniform Code of Military Justice¹²⁶ (UCMJ), the judge advocate generals have enormous statutory authority in the area of criminal justice. Their powers include the authority to modify or set aside certain court-martial cases on the grounds of newly discovered evidence, fraud on the court, lack of jurisdiction, error prejudicial to the accused's substantial rights, or appropriateness of the sentence; the authority to order rehearings or dismissal of charges in certain circumstances when findings or sentence are set aside; authority to establish Courts of Military Review and to order that their opinions be sent to the Court of Military Appeals for review. Accordingly, the UCMJ comprises, in part, well-defined statutory functions—in this example, statutory functions relating to the administration of military justice and discipline—that Congress explicitly gave to the judge advocate generals. By making the military department general counsel's opinion "controlling," however, the August 14, 1992 memorandum effectively transfers these powers to the general counsel, thereby violating the limits Congress placed on the Secretary of Defense.

The American Bar Association Section of Administrative Law and Regulatory Practice has gone on record in support of the proposition that the memorandum violates congressional limitations placed on the Secretary of Defense.

[T]he provision of the memorandum that purports to make the general counsels of the military departments the chief legal officers of their respective departments appears to be *inconsistent with the present statutory framework*^[127]. ... For example, the judge advocate generals have certain duties that Congress assigned them by statute.^[128] Those statutes suggest Congress did not intend that the judge advocate

¹²⁶ 10 U.S.C. §§ 801-846 (1988).

¹²⁷ Compare *id.* § 139(b) with *id.* §§ 3019(b), 5019(b), 8019(b).

¹²⁸ See *id.* §§ 869, 873.

generals be responsible to the General Counsel of the military departments in performing these duties. The same point may be made with respect to those uniformed lawyers who are performing specific duties prescribed by Congress under the Uniform Code of Military Justice—trial and appellate defense counsel and trial and appellate military judges. In addition, under current law, counsel and judges are certified as competent to perform their duties by the Judge Advocate General concerned. This certification power, which the law vests in the Judge Advocate General concerned, is clearly not subject to review by the General Counsel of the military department.

We strongly urge, therefore, that the Deputy Secretary of Defense temporarily suspend implementation of the March 3, 1992 memorandum until all interested parties, including the appropriate committees of Congress and the [American Bar Association], have had a full opportunity to review the memorandum. ... *Even if the Department [of Defense], upon further consideration, should decide to proceed with implementation of the realignment, it can do so only after certain statutory changes have been made.* ...¹²⁹

Those statutory changes either would have to designate the general counsel of the military departments the “chief legal officers” of their respective departments, or specifically would have to reassign the current statutory powers of the judge advocate generals to the general counsel of the military departments.

General qualifying language appearing in the March 3, 1992 and August 14, 1992 memoranda sought to avoid breaching the limits placed on the authority of the Secretary of Defense. The March 3, 1992 memorandum, for instance, directed the secretaries of the military departments to implement its provisions “in a manner consistent with applicable law.”¹³⁰ Similarly, the August 14, 1992 memorandum—which superseded the March 3, 1992 memorandum—directed the secretaries of the military departments to implement the provisions “in a manner consistent with statutes relating to the judge advocate generals of the military departments.”¹³¹ These apparent attempts to legitimize the

¹²⁹Letter from Thomas M. Susman, Chair of the American Bar Association Section on Administrative Law and Regulatory Practice, to The Honorable Richard B. Cheney, Secretary of Defense (Apr. 22, 1992) (emphasis added).

¹³⁰Memorandum, D. Atwood, *supra* note 73, subsec. (6).

¹³¹Memorandum, Acting Secretary of Defense, *supra* note 98.

directives contained in the memoranda notwithstanding, the secretaries of the military departments never could implement their provisions consistent with the law. The judge advocate generals cannot fulfill their statutory functions and simultaneously be subject to authority of the military department general counsel with respect to those functions. In other words, to the extent that the judge advocate generals carry out the responsibilities that the UCMJ confers upon them, *they* are the "chief legal officers" of, and *they* render the "controlling legal opinions" within, their respective military departments. Only Congress can designate a different "chief legal officer" to carry out the duties that the UCMJ vests in the judge advocate generals, or otherwise transfer, reassign, or consolidate these statutory functions.

Accordingly, only one of two possible conclusions derive from an analysis of the "chief legal officer" and "controlling legal opinion" provisions of the memoranda. Either these provisions run afoul of the constraints that Congress placed on the Secretary of Defense in reassigning, transferring, or consolidating statutory functions or, as mandates, they are utterly meaningless. The broad array of functions assigned to the judge advocate generals by statute, and the absence in the memoranda of any language that either acknowledges those functions or otherwise clearly excludes those functions from the penumbra of the general counsel's oversight, imply that the drafters of the memoranda did not intend the provisions to be merely precatory.

3. Relative Authority of the Deputy Secretary of Defense and the Secretaries of the Military Departments. — The authority of the Secretary of Defense also is limited by the assignment of functions, by statute, to the secretaries of the military departments. The August 14, 1992 memorandum, however, tremendously undercut the statutory authorities of the secretaries of the military departments. Actually, the March 3, 1992 memorandum undercut these authorities even more drastically.¹³² The Deputy

¹³²The superseded March 3, 1992 memorandum contained a provision that the general counsel of the military departments, in addition to being the "chief legal officers of their respective departments, would be "responsible to and subject to the authorities of the Secretaries of the military departments as the heads of the military departments, and the *General Counsel of the Department of Defense* as the chief legal officer of the Department of Defense." Memorandum, D. Atwood, *supra* note 73, subsec. (1) (emphasis added). This particular provision did not appear in the August 14, 1992 memorandum which superseded the March 3, 1992 memorandum; therefore, at least for the time being, this provision is not "law" in the Department of Defense. Nevertheless, it has a potentially dramatic impact on the statutory authority of the secretaries of the military departments. The provision would have created a "stovepipe" relationship between the general counsel of the military departments and the General Counsel of the Department

Secretary of Defense believed that he possessed the legal authority to designate the general counsel of the military departments the “chief legal officers” of their respective departments under 10 U.S.C. §§ 113, 3011, 5011, and 8011.¹³³ Section 113 is the general enabling statute for the Secretary of Defense.¹³⁴ Sections 3011, 5011 and 8011 are the general enabling statutes of the Departments of the Army, Navy, and Air Force, respectively. Section 5011, for example, states, “The Department of the Navy is separately organized under the Secretary of the Navy. It operates under the authority, direction, and control of the Secretary of Defense.”¹³⁵ The drafters of the memoranda obviously were relying on the second sentence of the statutes, in which the military departments operate under the “authority, direction, and control of the Secretary of Defense,” in finding authority to designate the general counsel of the military departments “chief legal officers.” The first sentence of the statutes, however, is equally telling. Congress decided that the military departments would be *separately organized* under the service secretaries. In addition, the framework of the enabling statutes for the secretaries of the military departments manifests

of Defense. This “stovepipe” relationship, which effectively bypassed the service secretaries, could have circumvented the prerogatives of the military department secretaries on all matters pertaining to military law. A subordinate Department of Defense official—that is, the DOD General Counsel—would have been able to extend his or her authority to subordinate military department officials—specifically, the military department general counsel—who, by congressional mandate, perform such functions as the *secretaries of the military departments* may prescribe. The potential impact of this provision would have been even stronger if it had been coupled with another key provision of the March 3, 1992 memorandum. This key provision would have given the general counsel of the military departments authority over “[c]ivilian and military personnel performing legal duties with respect to organizations or functions under the jurisdiction of the Secretary of the military department . . .” *Id.* subsection (3). Taken together, the two provisions would have extended the authority of the General Counsel of the Department of Defense, over and around the Secretaries of the military departments, through the General Counsel of the military departments, to lawyers, paralegals, and nonlawyer legal officers in the field and in the fleet. The resulting structures for military legal decision-making and for the provision of military legal services would have deviated substantially from Congress’s intent to leave authority to prescribe the duties of military department personnel in the hands of the secretaries of the military departments.

¹³³See Memorandum, D. Addington, *supra* note 73; Memorandum, T. O’Donnell, *supra* note 77.

¹³⁴10 U.S.C. § 113(b) (1988), provides as follows: “The Secretary is the principal assistant to the President in all matters relating to the Department of Defense. Subject to the direction of the President *and to this title* and Section 2 of the National Security Act of 1947 (50 U.S.C. 401), he has authority, direction, and control over the Department of Defense.” (emphasis added).

¹³⁵*Id.* § 5011. Sections 3011 and 8011 contain identical language for the Departments of the Army and Air Force.

the inherent value of maximizing the discretion of the secretaries whenever possible.

It is in the interest of the military departments and of [the Department of Defense] to maximize secretarial discretion whenever possible. To the extent that secretarial discretion is diminished, freedom and ability to choose among possible courses of action are lost. The primary reason secretarial discretion is provided **for** by Congress is the great flexibility such delegation provides to the officer appointed by the President to administer a department. A particular strength of such a system is the ability to select and use specialized staffs to deal with the complexities of modern organizational management. Limiting a Secretary's authority to use that staff in the manner in which he or she deems most suited to the department's best interests not only undermines secretarial discretion, but negates one of the key reasons why Congress delegated discretion in the first instance.¹³⁶

Sections 3011, 5011, and 8011 indicate that Congress provided each service secretary with discretion over how to organize his or her department. That discretion included the decision to designate his or her general counsel as the "chief legal officer" of the department. The sections are also in keeping with the congressional intent to confine the powers of the Secretary of Defense in transferring, reassigning, and consolidating functions.¹³⁷

This intriguing statutory design in which the organizational prerogatives of the secretaries of the military departments exist side-by-side with the authority, direction, and control of the Secretary of Defense is best understood by analyzing the type of authority the Secretary of Defense has in a particular area. While the Secretary of Defense has oversight over all areas of the service secretaries' responsibilities, oversight should not be confused with direct control. In separately organizing the military departments, Congress gave each service secretary broad authority and responsibility to conduct all affairs in his or her departments, subject in some, but not all, cases to the direct control of the Secretary of Defense. For example, six subsections

¹³⁶Memorandum, Administration Law Division, Office of the Judge Advocate General, Department of the Navy, subject: DEPSECDEF Memorandum of 3 March 1992, at ¶ 6(a) (Mar. 10, 1992) [hereinafter Dep't of Navy Memorandum].

¹³⁷See generally J. Moore & R. Turner, The Legal Structure of Defense Organization, Memorandum prepared for the President's Blue Ribbon Commission on Defense Management, at 130-143 (Jan. 15, 1986).

of the Secretary of the Navy enabling statute¹³⁸ delineate that secretary's authority. Of those *six* subsections, four clearly

¹³⁸**Title 10** prescribes the office and duties of the Secretary of the Navy as follows:

(a)(1) There is a Secretary of the Navy, appointed from civilian life by the President, by and with the advice and consent of the Senate, The Secretary is the head of the Department of the Navy.

(2) A person may not be appointed as Secretary of the Navy within five years after relief from active duty as a commissioned officer of a regular component of an armed force.

(b) *Subject to the authority, direction, and control of the Secretary of Defense* and subject to the provisions of chapter 6 of this title, the Secretary of the Navy is responsible for, and has the authority necessary to conduct, all affairs of the Department of the Navy, including the following functions:

(1) Recruiting.

(2) Organizing.

(3) Supplying.

(4) Equipping (including research and development).

(5) Training.

(6) Servicing.

(7) Mobilizing.

(8) Demobilizing.

(9) Administering.

(10) Maintaining.

(11) The construction, outfitting, and repair of military equipment.

(12) The construction, maintenance, and repair of buildings, structures, and utilities and the acquisition of real property and interests in real property necessary to carry out the responsibilities specified in this section.

(c) *Subject to the authority, direction, and control of the Secretary of Defense*, the Secretary of the Navy is also responsible to the Secretary of Defense for—

(1) the functioning and efficiency of the Department of the Navy;

(2) the formulation of policies and programs by the Department of the Navy that are fully consistent with national security objectives and policies established by the President or the Secretary of Defense;

(3) the effective and timely implementation of policy, program, and budget decisions and instructions of the President or the Secretary of Defense relating to the functions of the Department of the Navy;

(4) carrying out the functions of the Department of the Navy so as to fulfill (*to* the maximum extent practicable) the current and future operational requirements of the unified and specified combatant commands;

(5) effective cooperation and coordination between the Department of the Navy and the other military departments and agencies of the Department of Defense to provide for more effective, efficient, and economical administration and to eliminate duplication;

(6) the presentation and justification of the positions of the Department of the Navy on the plans, programs, and policies of the Department of Defense; and

(7) the effective supervision and control of the intelligence

subordinate the Secretary of the Navy to the Secretary of Defense.¹³⁹ Two of the six subsections, however, clearly do not—that is, the Secretary of the Navy’s authority to assign functions to subordinates¹⁴⁰ and—most pertinent for this discussion—the authority to *assign, detail, and prescribe the duties of members of the Navy and Marine Corps and civilian personnel of the Department of the Navy*.¹⁴¹ The design of the statute clarifies that Congress intended certain portions of each service secretary’s authority to be subject to the direct control of the Secretary of Defense, but that each service secretary could exercise other portions of that authority independently. Through the “chief legal officer” and “controlling legal opinion” provisions of the memoranda of March 3, 1992 and August 14, 1992 the Secretary of Defense has attempted to prescribe the “duties of members of the Navy and Marine Corps [the Judge Advocate General] and civilian personnel of the Department of the Navy [the General Counsel].” These prescriptions, however, invade the authority that the statutory scheme created by Congress clearly left to the secretary of each military department.

Pursuant to this statutory scheme, for instance, the Secretary of the Navy has exercised his authority to “prescribe the duties of members of the Navy and Marine Corps and civilian personnel of the Department of the Navy” by assigning to the

activities of the Department of the Navy.

(d) The Secretary of the Navy is also responsible for such other activities *as may be prescribed by law or by the President or Secretary of Defense*.

(e) *After first informing the Secretary of Defense*, the Secretary of the Navy may make such recommendations to Congress relating to the Department of Defense as he considers appropriate.

(f) The Secretary of the Navy may assign such of his functions, powers, and duties as he considers appropriate to the Under Secretary of the Navy and to the Assistant Secretaries of the Navy. Officers of the Navy and the Marine Corps shall, as directed by the Secretary, report on any matter to the Secretary, the Under Secretary, or any Assistant Secretary.

(g) The Secretary of the Navy may—

(1) assign, detail, and prescribe the duties of members of the Navy and Marine Corps and civilian personnel of the Department of the Navy;

(2) change the title of any officer or activity of the Department of the Navy not prescribed by law; and

(3) prescribe regulations to carry out his functions, powers, and duties under this title.

10 U.S.C. § 5013 (1988) (emphasis added).

¹³⁹ *Id.* §§ 5013(b)-(e).

¹⁴⁰ *Id.* § 5013(f).

¹⁴¹ *Id.* § 5013(g).

Navy Judge Advocate General responsibility for advice and litigation in areas such as admiralty law, claims, administrative investigations, international law, and operational law.¹⁴² The Secretary of the Navy similarly has assigned to the Navy General Counsel¹⁴³ separate areas of responsibility in areas such as business and commercial law, patent law, real estate matters, and contracting.¹⁴⁴ To the extent that the "chief legal officer" and "controlling legal opinions" provisions of the Deputy Secretary of Defense memoranda purport to alter the responsibilities that the Secretary of the Navy assigned to his Judge Advocate General and General Counsel, they are inconsistent with congressional intent to leave these decisions to the service secretaries. Mr. Addington essentially conceded that these provisions constrain the authority of the secretaries of the military departments in a written answer to his preconfirmation hearing questions.¹⁴⁵ Consequently, each memorandum—with one grand administrative stroke—significantly undercut the statutory powers vested in the secretaries of the military departments.

Whether the Secretary of Defense possesses the authority to mandate that the secretaries of the military departments designate their general counsel as the "chief legal officers" of their respective departments, and whether the individual service secretaries of the military departments possess the authority to give their general counsel certain supervisory responsibilities over their judge advocate generals are two entirely different issues. All

¹⁴²See generally SECNAV INSTR. 5430.27A, *supra* note 24; Navy Regs. 1990, *supra* note 47, § 0331.

¹⁴³Who, by virtue of 10 U.S.C. § 5019(b) is to "... perform such functions as the Secretary of the Navy may prescribe" (emphasis added).

¹⁴⁴See generally SECNAV INSTR. 5430.25D, *supra* note 22, and Navy Regulations 1990 § 0327.

¹⁴⁵The record of Mr. Addington's replies to preconfirmation questions contained the following:

QUESTION: Does the memorandum constrain the authority of a Secretary of a military department—

(1) to assign or reassign responsibilities or functions to or from an organization within the military department?

(2) to determine which organization will be given primary responsibility for a function within the military department?

ANSWER: The memorandum *does not constrain the authority of the Secretary of a military department* to assign or reassign responsibilities or functions to or from an organization within that department or to determine which organization will be given primary responsibility for a function within that department, *except that it requires that the General Counsel of the military departments be the chief legal officers of their departments and that their legal opinions be controlling within their respective departments.*

Answers by David S. Addington, *supra* note 45, subquestion 30g (emphasis added).

three “chief legal officer” initiatives of the early 1990s originated from the Department of Defense, but all three purported to apply that term, with its attendant authority, in an organizational context presumptively identical to one in which the Department of Defense General Counsel operates. To the extent they were implemented by the secretaries of the military departments—each of whom, unlike the Secretary of Defense, has a judge advocate general—these initiatives arguably were no more than obedient responses to the mandate of the Department of Defense.

Some have claimed that the judge advocate generals believe that they possess certain statutory functions that are not subject to oversight **or** supervision by anyone **or** any entity.¹⁴⁶ This overstates the independence of judge advocate generals, at least with respect to the Department of Defense initiatives of the 1990s. A more accurate statement of the position taken by the judge advocate generals is that the individuals holding their offices exercise certain statutory functions that are not subject to oversight **or** supervision by an individual possessing the powers attendant to the term “chief legal officer,” including a general counsel who administratively holds that title at the direction of the Department of Defense. Congress certainly possesses the authority to direct oversight, supervision, **or** reassignment of the statutory roles of the judge advocate generals. Moreover, each service secretary, by exercising his **or** her statutory authority to “assign, detail, and prescribe the duties” of members of his **or** her department, certainly possesses considerable authority to direct oversight of certain functions of the service’s judge advocate general.¹⁴⁷ Nevertheless, insofar as these changes reflect obedience to the Secretary of Defense—rather than the independent exercise of discretion vested in each service secretary by law, they exceed the statutory limits of the Secretary of Defense’s authority and concomitantly undermine the authority of each secretary of a military department.

B. Organizational Analysis

Aside from the issue of whether the Department of Defense initiatives of the early 1990s comport with existing statutes, a

¹⁴⁶ See, e.g., Haynes Memo, *supra* note 32, at 1.

¹⁴⁷ For example, the Secretary of the Army has, for at least 17 years, designated the General Counsel of the Army as the “chief legal officer” of that department. But for implementation by the Secretaries of the Navy and the Air Force at the mandate of the Department of Defense, the General Counsel of the Navy and the Air Force have not been so designated. Interestingly, the Air Force General Counsel, at least since 1985, has been the “final legal authority” in the Department of the Air Force on nonmilitary justice matters, by order of the Secretary of the Air Force. See SECAF Order 111.1, *supra* note 44.

complete analysis of these initiatives should answer the question, "Do they make organizational sense?" The response to that question, in particular, depends on whether the initiatives have any impact on achieving the military mission and, specifically, whether they have any impact on achieving the common goal of providing sound, impartial legal advice within the military departments and to military operational commanders.

1. Apples and Oranges: The Department of Defense and the *Military Departments*.—The early 1990s' efforts to designate the general counsel of the military departments the "chief legal officers" of their departments quite apparently were modeled after the designation of the Department of Defense General Counsel as the "chief legal officer" of the Department of Defense.¹⁴⁸

Title 10 of the United States Code provides that the General Counsel of the Department of Defense is the chief legal officer of the entire Department of Defense. As such, the General Counsel of the Department of Defense is responsible and accountable to the Secretary of Defense for and has the authority necessary to ensure uniform, proper interpretation and application of the law and delivery of legal services throughout the Department of Defense. The purpose of this memorandum is to provide similarly for a single chief legal officer for each of the Military Departments within the Department of Defense.¹⁴⁹

The DOD General Counsel's status as the "chief legal officer" of the Department of Defense, however, does not support the inference that designating the general counsel of the military departments as those organizations' "chief legal officers" is required, authorized, **or** even desirable. The conclusion that it does is a classic non sequitur because the requirement to employ, authority to consider, **or** desirability of selecting any particular organizational form in the Department of Defense simply are not the same in the military departments.

First, civilian employees and civilian functions predominate the organization of the Office of the Secretary of Defense. In particular, because Congress apparently has not seen fit to create a uniformed "Judge Advocate General of the Department of Defense," it has provided for only a civilian general counsel. Accordingly, the General Counsel appropriately serves as the "chief legal officer" of the Department of Defense. The title is especially consistent, given the DOD's role and function.

¹⁴⁸ 10 U.S.C. § 139(b) (1988).

¹⁴⁹ Memorandum, D. Atwood, *supra* note 73, opening para.

While [the Secretary of Defense] may be well served by making the Department of Defense General Counsel his chief legal advisor, the functions of DOD and the military departments are strikingly dissimilar. ... DOD is also largely insulated from the administrative aspects of day-to-day management of the Departments' thousands of military units, installations, and operations. DOD has almost no role in administering the [Uniform Code of Military Justice] or in providing direct support to field and fleet commanders. *OOO, thus, can function effectively with a single civilian legal counselor who may or may not possess expertise in military areas of practice* such as rules of engagement, operational law, the law of war, international administration of status of forces agreements, and so forth. That this is so detracts nothing from the need for such expertise within the military departments.¹⁵⁰

Unlike the Department of Defense, however, the development of "military areas of practice" has been a dynamic factor in the evolutions of the organizations of the military departments and in the roles of military department officials. The organization of each military service reflects years of adaptation directed not only at improving its ability to support its service secretary, but also at ensuring that both military and civilian members of the department support its military mission. Accordingly, Congress long has recognized the value of providing a professional military staff to assist and advise the secretaries of the military departments. The judge advocate generals and their offices are long-time members of this professional military staff, whereas the statutory addition of the general counsel of the military departments to the staffs of these departments' secretaries is of relatively recent origin. The secretaries of the military departments are given enormous discretion to organize their departments, and they typically have opted for a general division of labor that vests authority in the judge advocate generals over legal matters involving military justice, military law, and general law applied in a military context. The "chief legal officer" provisions of the March 3, 1992 and August 14, 1992 memoranda—at least with respect to the Navy and the Air Force—compel the military department secretaries artificially to adopt an organization patterned after the Department of Defense. This mandate interferes with the markedly different functions and statutory responsibilities of the military departments.

¹⁵⁰Dep't of Navy Memorandum, *supra* note 136, at n.5 (emphasis added).

Beyond their sharing the mutual job title, "General Counsel," the general counsel of the military departments and the General Counsel of the Department of Defense actually are markedly different positions. Functionally, the judge advocate generals serve as their departments' "general counsel" within their areas of expertise. That Congress chose to designate the General Counsel of the Department of Defense "chief legal officer," while declining to so designate the general counsel of the military departments, demonstrates its recognition that the functions of uniformed attorneys working in the Office of the Secretary of Defense differ considerably from the functions of uniformed attorneys serving in the military departments.

2. Impact on Organizational Effectiveness.—Another issue to consider in analyzing a change to the structure of any organization—particularly a public one—is whether the benefits accrued to the organization's efficiency or effectiveness justify the costs associated with the change. The "chief legal officer" and "controlling legal opinion" provisions of the Deputy Secretary of Defense memoranda fail this test in at least two respects. First, they add another layer of bureaucracy to the legal process. Second, the authority to render a "controlling legal opinion," which the memoranda purportedly vest in the general counsel of each military department, calls into question the finality of any legal opinions rendered by that service's judge advocate general.

At present, opinions rendered by the judge advocate generals in the area of military justice apparently are not subject to appeal to the general counsel of the military departments. In response to preconfirmation questions, however, Mr. Addington indicated that the authority to issue a "controlling legal opinion" is tantamount to the authority to supersede a judge advocate general's legal opinion, even in the absence of a formal appellate process.

The Deputy Secretary's memorandum does not provide a basis for the General Counsel of a military department to ... exercise appeal authority over a decision by the Judge Advocate General. The term 'appeal' is used here in the context of military judicial review, and should not be misconstrued as implying that asking the General Counsel of a military department for a legal opinion on a matter on which a Judge Advocate General has rendered an opinion is an 'appeal' of the opinion. The General Counsel's legal opinion is, under the Deputy Secretary's memorandum, the controlling legal opinion of the military departments.¹⁵¹

¹⁵¹ Answers by David S. Addington, *supra* note 45, answer to subquestion 30h.

Notwithstanding Mr. Addington's careful limitation of the definition of "appeal" to cases of "military judicial review," the prerogative to issue a "controlling legal opinion" jeopardizes the finality of judge advocate general opinions in nonmilitary judicial review cases. For example, judge advocate generals frequently render legal opinions on the status of a member of the armed forces, which in turn governs that service member's entitlement to certain benefits and to recover on certain types of claims. A second example, in the case of the Navy, is the Judge Advocate General's final opinion that the proceedings in a military promotion board were or were not flawed.¹⁵² Now that the general counsel of the military departments have the authority to render the "controlling legal opinion" within their departments, a service member apparently has a right to "appeal" a judge advocate general's opinion in these matters—that is, to request a superseding, "controlling legal opinion" from the department's general counsel.¹⁵³ Moreover, the August 14, 1992 memorandum's silence on whether the "controlling legal opinion" authority of the general counsel of a the military department is prospective or retrospective exacerbates the confusion over the finality of every legal opinion issued by a judge advocate general.

Creating an avenue of appeal from the opinions of the judge advocate generals to the general counsel of the military departments unnecessarily threatens the repose of the decisions of the senior uniformed attorney in each military service without any apparent benefit. In addition, the drafters of the Deputy Secretary of Defense memoranda failed to demonstrate that the proposed changes will improve the effectiveness of legal decision-making in the military services.¹⁵⁴ The costs, on the other hand, are obvious. The additional layer of bureaucracy substantially increases the chances that the legal service organizations in the

¹⁵² See 10 U.S.C. § 5148(d)(3) (1988).

¹⁵³ Under the proposed language of the Deputy Secretary of Defense memorandum of March 3, 1992, the general counsel of the military departments were made subject to the authorities of both the secretaries of the military departments and the General Counsel of the Department of Defense. See Memorandum, D. Atwood, *supra* note 73, subsec. (1). Had that language survived in the August 14, 1992 memorandum, which superseded the March 3, 1992 memorandum, the military member in the textual examples apparently would have enjoyed an additional right of "appeal" from the opinion of the general counsel of the military department to the General Counsel of the Department of Defense.

¹⁵⁴ Interview with Mr. Paul Beach, *supra* note 8. Mr. Beach referenced several problems in the past with military officer promotion boards and with legal advice and opinions rendered by uniformed judge advocates. Even if Mr. Beach were correct, his assertion does not necessarily mean that legal advice and opinions on these matters rendered by military department general counsel would be any improvement. A subsequent section of this paper will explore "political pressures" on the military department General Counsel and the Judge Advocate Generals in this and other areas of the law. See *infra* part III.C.

armed forces will be dilatory in responding to the needs of the field or fleet, fosters conflict where none previously existed, and hinders meaningful reliance on the final judgments of the judge advocate generals.

3. Impact on the Organizational Responsibilities of the Judge Advocate Generals.—One of the many unanswered questions generated by the “chief legal officer” provision of the August 14, 1992 memorandum is, “What will be its impact on the existing organizational responsibilities of the judge advocate generals?” For example, the Judge Advocate General of the Navy is an “echelon 1”¹⁵⁵ commander of the following shore activities under the supervision of the Under Secretary of the Navy: Naval Civil Law Support Activity, Navy-Marine Corps Appellate Review Activity, Navy-Marine Corps Trial Judiciary and United States Sending State Office for Italy.¹⁵⁶ The Deputy Judge Advocate General actually serves in two positions: Commander, Naval Legal Service Command, an “echelon 2” commander of twenty-one naval legal service offices and their detachments around the world, and the Naval Justice School. The Chief of Naval Operations supervises all of these offices,¹⁵⁷ yet all of them involve—or contribute to—the delivery of legal services, which places them under the auspices of the Navy’s “chief legal officer.” Therefore, their functions could be subjected to organizational tensions created by the competing interests between the Chief of Naval Operations and the Navy General Counsel. To the extent that the DOD-directed “chief legal officer” status of the military department general counsel modifies the organizational relationships and prerogatives noted above, it effectively has undercut the authority of each service secretary to organize and operate the department in the manner he or she believes to be most efficient and effective.

4. Organization to Support the Military Mission.—Every civilian and military official working for, guiding, or overseeing the Department of Defense should start each day by reminding himself or herself of the overriding purpose of the military. In very simple terms, the peacetime military’s primary mission is to be organized and ready to fight and win wars. The Navy, for example, states its military mission as follows:

The Navy within the Department of the Navy shall be organized, trained and equipped primarily for prompt and sustained combat incident to operations at

¹⁵⁵Dep’t of Navy, Standard Navy Distribution List Part 2, Edition 73, 92 (1 Mar. 1990).

¹⁵⁶*Id.* at 92.

¹⁵⁷*Id.* at 77-78.

sea. It is responsible for the preparation of forces necessary for the effective prosecution of war except as otherwise assigned, and in accordance with integrated joint mobilization plans, for the expansion of the peacetime components of the Navy to meet the needs of war.¹⁵⁸

Every piece of legislation, every administrative measure, and every other action undertaken that affects the Department of Defense should address first and foremost how that action will help or hinder accomplishment of the military's mission. Changes to, and reorganization of, military department legal services wrought by the Deputy Secretary of Defense memoranda will hinder accomplishment of the military's mission. These changes closely resemble the changes sought as far back as 1955 by the Commission on Organization of the Executive Branch of Government. Among the Commission's recommendations was a proposal that the judge advocate generals be "professionally responsible to the General Counsel of their respective departments for the administration of military justice ... the legal work performed by uniformed lawyers in connection with military affairs, and for such other legal work as may be assigned."¹⁵⁹ The Department of the Army's comments on this proposal are as valid today as they were in 1955.

... The peacetime Army should be organized for war. In wartime an Army in the field must have a wide range of legal services extending far beyond military justice and "military affairs." Overseas procurement, the operation of an extensive claims service, acquisition of land and facilities, the application of international law (a large portion of which involves the so-called "law of war"), and the provision of legal assistance to all soldiers are all of vital concern to an Army in the field both in war and in the period of occupation after wars are won. In suggesting limitation of The Judge Advocate General to the fields of military justice and "military affairs," the Commission is not clear as to the intended meaning of the term "military affairs." If that term is taken to exclude the present worldwide activity of The Judge Advocate General in the legal aspects of military procurement; contract administration; non-

¹⁵⁸NAVY REGS. 1990, *supra* note 47, § 202(1).

¹⁵⁹Commission on Organization of the Executive Branch of the Government, Report to the Congress on Legal Services and Procedure, recommendation 10 (Mar. 1955), *reprinted in* Department of the Army Comments Upon A Report to the Congress, March 1955, on Legal Services and Procedure of the Commission on Organization of the Executive Branch of the Government (n.d.).

discrimination in employment by Government contractors; compliance with labor standard laws by Government contractors; disposal of surplus property; military claims services; military litigation activities; taxation of Government contractors and collaboration with the Department of Justice in the conduct of litigation in the tax field; the military aspects of international law (including the "laws of war"); the acquisition and disposal of lands for military use; the military implications of patents; participation in military governments and the administration of occupied and trust areas; participation in the negotiation of armistices, treaties and international agreements; representation of the Government before boards and quasi-judicial bodies; membership on numerous interdepartmental boards and committees, and the furnishing of legal assistance to military personnel, then a vast new civilian-lawyer service must be established to perform these functions, which are now carried on largely by uniformed personnel. These services are now provided by The Judge Advocate General's Corps both in peace and in war, both at home and overseas. ... To provide that some other agency be established to perform these functions for the Army in peacetime in the United States is wasteful as a duplication of services. The cost of such a new organization could be justified only if the services now provided by judge advocates were deficient. ...

....

.... The effect of this recommendation would be the subordination of The Judge Advocate General to a civilian General Counsel and the limitation of the services provided by The Judge Advocate General to military justice and "military affairs" matters. A large new system of civilian attorneys would be required to perform the functions taken from The Judge Advocate General. An intervening layer of civilian attorneys would be added to the military justice system. *The military effectiveness of judge advocates for use with armies in the field would be greatly impaired both during campaigns and in post-hostilities periods. It might require adding a second legal office (civilian) to each commander's staff, and would be destructive of a competent, efficient Judge Advocate General's Corps.*¹⁶⁰

¹⁶⁰ *Id.* recommendation 10, at 6, 7, 11 (emphasis added).

A military organization whose function is to fight and win wars requires an independent staff composed of well-trained military officers, to include lawyers. In Operation Desert Storm, for instance, hundreds of military lawyers deployed to the theater of operations. The Army alone had about two hundred lawyers in theater, six of whom were the first Reserve officers to be called to active duty during the mobilization.¹⁶¹ The Navy, Marine Corps, and Air Force also deployed scores of lawyers to the Gulf region. The sole function of this cadre of lawyers was to provide legal support to the operators—that is, the war-fighters—whose mission was to prepare for and engage in combat. The “chief legal officer” and “controlling legal opinion” provisions of the Deputy Secretary of Defense memoranda, however, threaten to interfere with this function by shifting the focus of legal support from military commanders at the operational level to administrators at headquarters activities. Moreover, dismissing this threat by asserting that a “military” interpretation of law is no different than a “civilian” interpretation of the law¹⁶² misses the point.

Significantly, the vast array of uniformed legal services provided to military members around the world are structured to assist and support the operators’ mission of fighting and winning wars. The very purpose for the Judge Advocate Generals Corps’ existence is to assist those in the field and fleet in accomplishing their operational missions. To the extent that the “chief legal officer” and “controlling legal opinion” provisions of the Deputy Secretary of Defense memoranda detract in any way from the most efficient, effective accomplishment of those operational missions, they are unwise. Structuring the military legal system so that civilian general counsel supervise and control the delivery of legal services during peacetime, but are replaced by uniformed attorneys during a period of hostilities, makes little sense. “As we train, we fight”—the military’s mission must remain in focus. If the uniformed lawyer will be “on the bridge” or at the general’s side during hostilities, and the commander will rely on the

¹⁶¹ Steven Keeva, *Lawyers in the War Room*, A.B.A.J., Dec. 1991, at 54. These Reserve judge advocates were members of the 46th International Law Detachment.

¹⁶² The Army General Counsel asserted the following:

.... While people of different backgrounds will approach an issue from different perspectives, most emphatically there are not separate, equally correct, military and civilian answers to the question, “What is the law?” An Army lawyer’s goal should be to put any Army decision on the best possible legal footing, which will involve the same legal considerations whether they come from a military or civilian perspective. Both the advice and the solution should rest upon legal principles which competent attorneys, whether military or civilian, would agree apply to the facts.

Haynes Memo, *supra* note 32, at 10

lawyer's advice to make crucial decisions—some involving life and death—then during peacetime, while training for those hostilities, the uniformed lawyer must fulfill an identical role. Decision-makers at the headquarters level, and operational commanders at the field level, should have well-developed working relationships with, and supreme confidence in, the lawyers on whom they must rely during periods of hostility.

5. *Civilian Control of the Military.*—The time-honored principle and tradition of civilian direction and control of the military services is one of the principal justifications for designating general counsel the “chief legal officers” of their respective departments. For example, one of the key guest speakers at the 1992 Navy Judge Advocate General's Corps Conference offered “civilian control of the military” as one of two reasons for the changes sought by the Deputy Secretary of Defense memorandum of March 3, 1992.¹⁶³ The legislative history of the Goldwater-Nichols Act reveals a congressional intent to maintain the General Counsel of the Navy as a “key assistant to the Secretary of the Navy, particularly on sensitive matters directly related to civilian control of the military.”¹⁶⁴ At least as far back as 1955, many believed that “[t]he corollary to the traditional concept of civilian responsibility for administration of the military departments is that a civilian general counsel should be in charge of legal services.”¹⁶⁵

Nevertheless, the assertion that civilian general counsel must be in charge of military department legal services stretches the concept of civilian control over the military. First, civilian control of the military services does not mean that civilians are in charge of all the day-to-day details of administering policies and programs in the Department of Defense. Rather, it means that

¹⁶³This is based on the author's recollection of the remarks made by a key Navy official, when he responded to a question on the rationale for the March 3, 1992 memorandum in Spring 1992. The other reason advanced—which also is based on the author's recollection—was the Administration's right, and perhaps duty, to impose its ideas and policies on the Department of Defense. This latter justification will be explored in the policy analysis section of this article. See *infra* part III.C. The key official is not identified pursuant to the nonattribution policy that was in effect at the time the statement was made.

¹⁶⁴S. REP. NO. 280, 99th Cong., 2d Sess. 63 (1986), reprinted in 1986 U.S.C.C.A.N. 2168, 2231. This author asserts that the language, “key assistant ... on sensitive matters directly related to civilian control of the military,” refers to the service *secretary's*—not the general counsel's—role in maintaining civilian control. The secretaries of the military departments—as well as the Secretary of Defense, the President, and the Congress—provide ample “civilian control of the military.” Accordingly, the quoted language is evidence of congressional intent for the general counsel of the military departments to play a role in advising their secretaries on matters of civilian control—not in actually exercising that control.

¹⁶⁵Commission on Organization of the Executive Branch of the Government, Report to the Congress on Legal Services and Procedure 5 (Mar. 1955).

the military services are governed by a civilian command authority—that is, a President and a Secretary of Defense—in accordance with laws imposed by a civilian Congress.

Civilian control of the military is accomplished by the Congress, the President, and the civilian Secretaries of Defense and of the Army. It does not mean that each professional or other service of the Army is headed by a civilian. Most of the technical services of the Army employ more professionally trained civilians than does the legal service yet they are all headed by military officers as is proper for a *military* technical service. The entire legal service of the Army, containing both military and civilian lawyers, is also a *military* service. It has no purpose that is not military. Its service is provided only to other elements of the military organization from the Secretary on down to combat divisions and the individual soldier. The head of that military service should be a military officer for the same reason that the heads of the other services of the Army are military officers.¹⁶⁶

In addition, the existing framework for civilian control of the military has endured with no apparent attacks on its plenipotence.

The task force does not explain why this “corollary” should apply now when it has never been applied before since the Judge Advocate General’s Department was created in 1775, or why it should apply to the legal service of the Army when it does not apply to the Army’s medical service, engineer service, chaplains service, or any other professional, technical, or general or special staff service. ... Again, no reason is seen to change to a system strange to the Army and unsuited to it when the *existing system is working well*. If it is thought by the Commission that the General Counsel of the Department of Defense should have but one individual in the Army to look to as the head of its legal service, he can look to the Judge Advocate General of the Army. ...¹⁶⁷

The judge advocate generals serve under the civilian control of Congress; the President; the Secretary of Defense; the Deputy and Assistant Secretaries of Defense; and the secretaries, under secretaries, and assistant secretaries of their respective military

¹⁶⁶*Id.* at 5, 6.

¹⁶⁷*Id.* (emphasis added).

departments. In particular, they are obliged to follow the lawful military orders of these superior officials under all circumstances. Consequently, designating the general counsel of the military departments "chief legal officers" actually does nothing to facilitate, or promote the dogma of, civilian control.

C. Policy Analysis

In addition to the mandates of federal statutes and the interests in structuring military legal services in the most effective and efficient manner, public policy has a considerable effect on how the armed forces should organize its legal services. A public policy analysis requires an examination of the perspectives from which the general counsel and the judge advocate generals must operate, a comparison of the experiences that they typically bring to their jobs, and an evaluation of the impacts of conflicts of interest on the universally accepted tradition of "accountability" in the military service.

The objective in analyzing each of these factors is to determine which framework for the delivery of military legal services has the least potential for injecting undesired political influences into a process that normatively should lead to the rendition of objective legal advice. Significantly, the nature of military law makes the merits of any change to its processes inextricable from this analysis. An examination of these factors, however, demonstrates that making the general counsel of the military departments "chief legal officers," having supervisory authority over their respective judge advocate generals, will increase the likelihood of improper political influence on legal advice; create confusion and delay over the finality of legal opinions; interpose the oversight and authority of civilians who may not have experience and training in military law between the renderers and recipients of military legal advice; create conflicts of interest for military department general counsel; weaken the concept of "accountability."

1. Unlawful Command Influence and Political Agendas. — The specter of "unlawful command influence," or unlawful influence of a criminal proceeding by the prosecution or those who convene and review courts-martial, lessened somewhat in the August 14, 1992 version of the Deputy Secretary of Defense memorandum. The March 3, 1992 version of the memorandum contained a provision that "[c]ivilian and military personnel performing legal duties with respect to organizations or functions under the jurisdiction of the Secretary of a military department shall be subject to the *authority* of the General Counsel of that military department with respect to the performance of those

legal duties.”¹⁶⁸ Each of the military departments has structured its delivery of criminal defense services to guard against unlawful command influence. The Army, Marine Corps, and Air Force have independent defense chains of command, and the Navy has an independent Naval Legal Service Command. The “authority” provision of the March 3, 1992 memorandum threatened the viability of those organizations because the conclusory language of the provision apparently would have given the military department general counsel “authority” over even defense counsel. This particular provision of the March 3, 1992 memorandum, however, does not appear in the superseding August 14, 1992 version.

Perhaps the greatest danger under the current “chief legal officer” and “controlling legal opinion” regime in the Department of Defense is the susceptibility of legal advice to political agendas—not only within the executive branch, but also between the executive branch and Congress. The provisions of the Deputy Secretary of Defense memoranda may, when fully implemented, institutionalize this susceptibility to political influence, allowing it to pervade all legal advice rendered within the military departments and to operational commanders in the field. Legal advice and opinions of the judge advocate generals, however, should and must be insulated from political influences.

[T]he judge advocate generals [need] to have professional independence and not to be subject to influences of short-term political vagaries.

....

To ensure fairness and justice for the brave men and women in the military who can be, and often are, required to place their lives on the line for their country, the trend has been to increase the judicialization and responsibilities of the Judge Advocate General, thus increasing a need for their professional independence.

Thus, many current responsibilities and duties of the Judge Advocate General are judicial in nature, and require them to exercise independent professional judgment uninhibited by extraneous influences. This includes the certification, selection, training and assignment of all Judge Advocates, as well as certifying of Trial Counsel, Defense Counsel, and Military judges. They are required to make frequent field inspections, to overview military judicial activities that ensure effec-

¹⁶⁸Memorandum, D. Atwood, *supra* note 73, subsec. (3) (emphasis added).

tive administration of the Uniform Code of Military Justice (UCMJ) and review all general courts-martial as prescribed by Articles 65 and 69 (Title 10 U.S. Code, Section 865 and 869, respectively).

Indeed, they are a court of last resort in a large number of cases. They select cases which are to be certified to the Court of Military Appeals (COMA). They also have assigned statutory duties concerning Courts of Inquiry, Military Commissions, and Boards for Promotion and Retirement.

To subject the judge advocate generals to the reality, or even the appearance of, control by [the Secretary of Defense] in these matters which have been statutorily consigned to them, would constitute a basic alteration of the checks and balances of the UCMJ, and of the statutorily required, as well as perceived, independence of these officers.¹⁶⁹

The general counsel of the military departments are presidential political appointees. At least some of these general counsel believe that a President's administration—of which they are a part—has a right, and perhaps a duty, to impose its ideas and policies on the Department of Defense and the military departments.¹⁷⁰ Furthermore, because each general counsel now enjoys the title, "chief legal officer," the position apparently empowers its incumbent to act upon those beliefs. By vesting in a political official such broad authority over the enforcement of good order and discipline in the armed forces, the checks and balances of the UCMJ will vanish, and the potential influence from transient political vagaries will rise. The objectivity and fair administration of military law would continually be threatened by presidential election-year politics, by a decline in an administration's popularity among voters, by an intolerance among political operatives for seeing matters of military justice or military investigations in the public media, or by the political ambitions of a general counsel.

One of the military department general counsel has taken exception to the assertion that a general counsel would be influenced by the political winds of the day.

¹⁶⁹Penrose L. Albright, *The Recent SecDef Proposal to Make General Counsels the Chief Legal Officers of Their Military Departments Should be Reconsidered*, NAVAL RESERVE ASS'N NEWS, May 1992, at 20 (Albright is a retired Rear Admiral in the Judge Advocate General's Corps, United States Naval Reserve).

¹⁷⁰See *supra* note 163.

An Army lawyer's goal *should* be to put any Army decision on the best possible legal footing, which will involve the same legal considerations whether they come from a military or civilian perspective. Both the advice and the solution *should* rest upon legal principles which competent attorneys, whether military or civilian, would agree apply to the facts.¹⁷¹

Nevertheless, while all lawyers in government service—whether military or civilian—“should seek these laudable goals, what “should be” and what actually “is” often are quite different. Accordingly, even though the military department general counsel all may be good and honorable public servants, the legal system still should be designed to promote objectivity.

Other respected authorities rigorously challenge the notion that the general counsel are “political lawyers” and that judge advocate generals operate in a political vacuum. Neither assertion likely is completely true. As the Department of Defense Principal Deputy General Counsel pointed out,¹⁷² a series of problems in the recent past, which occurred in military officer selection boards, demonstrated that even uniformed lawyer legal advice can be subjected to political influences.¹⁷³ Such occasional transgressions, however, should not prevent policy-makers from structuring the organization of military legal services to minimize *systemically* the exposure of legal advice to unlawful command influence and political agendas.

Moreover, the differences in the methods of selecting general counsel and judge advocate generals provide some insight into their relative susceptibilities to political influences. The military department general counsel are political appointees of the incumbent President. Although ability presumably is the principal criterion in selecting each general counsel, presidential nominations—regardless of the position to be filled—naturally depend on other, politically sensitive factors. Like other political appointees, general counsel typically were active in the President's political party, serve at the pleasure of the President, and will leave office when the President leaves office. The judge

¹⁷¹Haynes Memo, *supra* note 32, at 10 (emphasis added).

¹⁷²Interview with Mr. Paul Beach, *supra* note 8.

¹⁷³Mr. Beach conceded, however, that the general counsel of the military departments would not necessarily have avoided “politics” had they acted on these promotion boards in place of the judge advocate generals. Mr. Beach's point, therefore, was not that political influence of the promotion boards would have been avoided altogether by replacing the judge advocate generals with the general counsel but, rather, that the judge advocate generals are not immune from the influence of politics.

advocate generals, on the other hand, initially are screened by a military selection board, do not engage in formal partisan politics, are appointed by statute for a period of four years, and typically have retired after serving in that position. Finally, while neither general counsel nor judge advocate generals are more ambitious than the other, the nature of their ambitions would appear to differ tremendously. In particular, the military department general counsel likely harbor political ambitions of developing their current occupations, typically by seeking higher public offices; they perceive their assignments as just *one step* in accomplishing a successful career of public service. The ambitions of judge advocate generals, however, likely are directed at transitioning out of their current occupations, typically by retiring and continuing their careers in the private sector. Unlike the civilian general counsel, the public service that the judge advocate generals know is *military* service. Therefore, each of them understandably and deservedly can acknowledge that he or she has reached the *final step* in—and the pinnacle of—an already successful career in military law.

These factors, taken together, do not necessarily make individual judge advocate generals less political than the general counsel. Nevertheless, they systemically reduce the likelihood that the judge advocate generals will be products of the political system as well as the likelihood they will be subject to improper influence of transient political agendas. Congress wisely has placed a relatively thick insulation between the roles of the judge advocate generals and the political world.

From a historic viewpoint, it makes little sense and, indeed, is regressive to make the Judge Advocate General of the Navy subordinate to the Navy's General Counsel, whereby the latter would have the authority to screen (and apparently overrule) [Judge Advocate General] legal advice on Military Justice, military personnel matters, and other area which for a century have been the exclusive domains of Military judge advocate generals.

The present system of the Navy not only works fine, it makes sense. *It allows the Secretary of the Navy to receive legal advice from a politically appointed General Counsel on matters involving political interests, whereas, in the typically apolitical matters of Military Justice, claims, admiralty, and military personnel matters, the chief legal advisor to the Secretary is a career Naval officer selected for excellence, having years of practical "hands-on" experience in the fields of law.*

It has worked well for many years; there is no good reason to attempt to change it. If it ain't broke, don't fix it!¹⁷⁴

Consequently, to the extent that the "chief legal officer" and "controlling legal opinion" provisions of the Deputy Secretary of Defense memoranda cause a filtering of judge advocate general opinion and advice through a political prism, they run counter to the common goal of providing impartial legal advice within the military departments and to military operational commanders.

2. *The Tools for the Job.*—Although a combination of uniformed and civilian lawyers is needed to accomplish the DOD's legal business effectively, each uniformed and civilian lawyer in the Department of Defense has a separate area of responsibility for which some expertise, training, and experience make him or her uniquely qualified. Therefore, an important question in this analysis is, "Who generally can be expected to possess the best expertise, training, and experience to advise military operational commanders in the area of military law—the general counsel of a military department or its judge advocate general?" The answer depends on whether military leaders—both uniformed and civilian—fairly can depend on the military background of a judge advocate general to make his or her legal advice more helpful to military decision-making than a general counsel's legal advice.

The prerequisites to these positions provide some insight in resolving this issue. The only statutory requirement that applies to a nominee for a military department general counsel is that he or she be "... appointed from civilian life by the President, by and with the advice and consent of the Senate."¹⁷⁵ A nominee for a judge advocate general, in contrast, not only must be appointed by and with the advice and consent of the Senate, but also must have had at least eight years of experience in legal duties as a commissioned officer; and must possess the qualities necessary to become either a rear admiral in the Navy, or a major general in the Army or Air Force.¹⁷⁶ A nominee for judge advocate general who satisfies all of these legal prerequisites must be, by definition, an experienced lawyer in military law, a seasoned military officer, a knowledgeable leader in his or her respective military service, and a tested practitioner who has achieved the "pinnacle" of a career in military law. Accordingly, military leaders can be assured that the judge advocate generals are highly qualified lawyers within their respective departments

¹⁷⁴Albright, *supra* note 169, at 27 (emphasis added).

¹⁷⁵10 U.S.C. § 3019 (1988) (*Army*); id. § 5019 (Navy); id. § 8019 (Air Force).

¹⁷⁶*See generally* id. § 3037 (*Army*); id. § 5148 (Navy); id. § 8037 (Air Force).

because the law demands that these positions be filled with individuals who already possess substantial expertise, training, and experience in military law.

On the other hand, while the general counsel of the military departments are undoubtedly skillful and intelligent lawyers, nothing *requires* that they know anything about the military, or have any particular degree of legal experience—either in or out of the military. Unlike the judge advocate generals, the general counsel may have little or no military experience, may possess little or no legal experience, and have long-term political aspirations.

The organizations headed by the general counsel of the military departments and the judge advocate generals also differ widely. The judge advocate generals are in charge of vast, worldwide organizations dedicated to meeting the legal needs of the warfighters. Legal problems arise in all areas of the law, but particularly in areas such as international and operational law for units engaged in hostilities in which military discipline takes on vital importance. The members of the services' judge advocate general organizations are available to be deployed to combat areas to address these problems. A civilian legal service is not available for this purpose. Judge advocates in the fleet and field, experienced military officers and lawyers, provide legal advice and assistance to military operational commanders relatively free of institutional conflicts of interest, and are particularly attuned to the legal requirements of the operational commander. These lawyers must possess a broad understanding of the authority of the operational commander, the specialized needs of good order and discipline within the military service, and operational law. Most significantly, these lawyers are directly accountable to their operational commanders.

The relatively smaller organizations of the general counsel of the military departments are structured quite differently. In the Navy, for example,

Over the years, the Office of the General Counsel of the Navy has grown to include a Central Office, which includes that portion organizationally within the Office of the Secretary; the Patent Counsel for the Navy; the Offices of Counsel for the Commandant of the Marine Corps, the Military Sealift Command, the Office of Naval Research, the Office of the Comptroller of the Navy, the Naval Data Automation Command, and the various Systems Commands. It also includes Offices of

Counsel for Navy and Marine Corps field activities, together with their Branch or Regional Offices.

All lawyers in this organization are, by virtue of regulation, selected by the General Counsel subject to the approval of the head of the naval activity to which assigned. The General Counsel prepares, or assigns responsibility for preparing, performance-ratings for all lawyers in the Office of General Counsel, and reviews all such reports. All personnel actions affecting these lawyers, such as changes in grade, transfers or terminations of services, and establishment, revision, or elimination of position descriptions, are subject to the approval of the General Counsel. Additionally, the General Counsel has established Regional or Branch Offices and has appointed lawyers to staff them.

This structural alignment has three related deficiencies. First, except for Military Justice and Legal Assistance functions, responsibility for both legal policy formulation, program implementation, and oversight authority is vested in a single officer: the General Counsel. Second, field civilian lawyers in the Department are not accountable to the commanders for whom they work, but answer to a distant General Counsel. Third, the Department is required to support two separate worldwide legal organizations in both the Navy and Marine Corps.¹⁷⁷

In contrast to the field-oriented organizations of the judge advocate generals, the offices of the military department general counsel are concentrated at the headquarters level and are predominated by very senior officials. According to the 1992 "Plum Book,"¹⁷⁸ which lists the various senior officials in the United States government who are in positions of making and supporting government policy, the Washington, D.C., area alone has twenty-two senior government executives in the offices of military department general counsel—seven in the Army, five in the Navy, and ten in the Air Force.¹⁷⁹

The disparity between the qualifications necessary for an officer to be selected as a judge advocate general and factors used

¹⁷⁷Department of the Navy, Office of the Judge Advocate General, Administrative Law Division, memorandum *Department of the Navy* 3 (n.d.). Significantly, the Office of the Navy General Counsel is far larger than the offices of the Army General Counsel and the Air Force General Counsel.

¹⁷⁸*Senate Comm. on Governmental Affairs, Policy and Supporting Positions, S. Prt. 102-509*, 102d Cong., 2d Sess. (1992).

¹⁷⁹*Id.* at 40-41 (Army); *id.* at 46 (Navy); *id.* at 36 (Air Force).

to nominate a military department general counsel, are tremendous. As gifted and dedicated as they are in their traditional areas of expertise, general counsel simply lack the training and experience in military law possessed by every judge advocate general, and the organizations to which the general counsel belong are not structured to provide direct assistance to military operational commanders. The practice of military law is a specialty for which the services' judge advocate generals organizations are uniquely structured, and for which military lawyers are uniquely trained and experienced. Therefore, from a policy perspective, designating the general counsel as "chief legal officers" over the judge advocate generals and members of their organizations makes little sense.

3. Serving *Two* Masters.—The March 3, 1992 memorandum would have made the general counsel of the military departments "subject to the authorities of [both] the Secretaries of the military departments. . . . and the General Counsel of the Department of Defense"¹⁸⁰ This provision was particularly disturbing from a public policy perspective, because it would have set up a dual chain of accountability and almost certainly would have invited conflicts of interest for the general counsel of the military departments. First, whenever the interests of a particular service secretary diverged from the interests of the General Counsel of the Department of Defense, that military department's general counsel would have to resolve a conflict of interest. Specifically, the advice provided by a military department general counsel may depend upon which of the two masters he or she is bound by law to serve, or whose interests he or she is compelled by ethics to protect. Second, law and policy tend to merge at the level of a military department secretary. With the purest motives in mind, the military department general counsel would be in a position to settle "policy" issues on "legal" grounds, before they ever came to the attention of the military department secretary. Coupled with the "chief legal officer" and "controlling legal opinion" provisions of the memorandum, the accountability of the military department general counsel to the Department of Defense General Counsel would have stripped the service secretary of his or her ability to obtain impartial legal advice.

Fortunately, the "dual accountability" provision of the March 3, 1992 memorandum did not survive in the August 14, 1992 version of the memorandum. Nevertheless, the potential for conflicts of interest under the current "chief legal officer" and "controlling legal opinion" regime continue to threaten a service secretary's ability to obtain balanced legal advice. This problem is

¹⁸⁰Memorandum, D. Atwood, *supra* note 73, at subsec. (1).

most evident at the field and fleet level, at which a judge advocate delivers legal advice to a military operational commander. With few minor exceptions, military lawyers at these levels are completely accountable to the operational commanders for whom they work—they serve one “master.” Accordingly, they are particularly attuned to the legal needs of those commanders, anticipating their legal requirements, and synchronizing the provision of legal services with the other aspects of military operations. Although attorneys from the offices of the military departments’ general counsel are attached to the staffs of military operational commanders at operational levels, they are accountable directly to the general counsel of the military department—that is, they serve two “masters.” Conceivably, if a military department general counsel habitually attempts to accommodate transient political interests, the advice provided by the attorneys who are accountable to that general counsel likely will be similarly accommodating, and perhaps inconsistent.¹⁸¹ A military operational commander, however, may be confronted suddenly with a myriad of unimagined issues, forcing him or her rapidly to make a number of decisions based on extrapolations from the sound legal advice he or she is accustomed to receiving. That commander, who is looking for any thread of consistency and predictability that he or she can draw upon to facilitate prudent decision-making, is ill-served by the vagaries arising from such political accommodation.

Finally, another sense of the term “accountability” is important in analyzing the impact of the Deputy Secretary of Defense memoranda. For centuries, the United States military has honored the principle of accountability for those in command. Navy Regulations, for example, state the following:

The responsibility of the commanding officer for his or her command is absolute, except when, and to the

¹⁸¹ Coincidentally, shortly after the Deputy Secretary of Defense issued the March 3, 1992 memorandum, the Secretary of Defense criticized a congressional proposal to create a new post of director of national intelligence. This new post was to have authority over both military and civilian intelligence agencies and the power to make them work together at less cost. The acting Defense Department General Counsel “labeled as ‘unacceptable’ provisions that would give the intelligence director authority to ‘manage’ the collection work of the [National Security Agency] and the [Defense Intelligence Agency].” Wash. Post, Mar. 24, 1992, at A1, 7. The acting Defense Department General Counsel stated that these two agencies are, by law, “‘combat support agencies’ that must be ‘especially responsive to the needs of war-fighting commanders.’” *Id.* (emphasis added). By the same rationale, each service’s judge advocate general’s corps is a “combat support agency” that should be “especially responsive to the needs of war-fighting commanders.” The noted provisions of the August 14, 1992 memorandum reduce such responsiveness.

extent to which, he or she has been relieved therefrom by competent authority, or as provided otherwise in these regulations. The authority of the commanding officer is commensurate with his or her responsibility. While the commanding officer may, at his or her discretion, and when not contrary to law or regulations, delegate authority to subordinates for the execution of details, *such delegation of authority shall in no way relieve the commanding officer of continued responsibility for the safety, well-being and efficiency of the entire command.*¹⁸²

All of the military services share the axiom that, although an officer's authority is delegable, his or her accountability never is. A captain of a Navy ship, for example, expects to be relieved of command when his or her ship runs aground, even if subordinates, by delegated authority, were completely in control of the ship at the time of the incident. The captain remains accountable for the incident. The recent uproar over the "Tailhook" incident surely stemmed, at least early on, from the failure of those highest in the chain of command to take responsibility—that is, to be held accountable—for the untoward affair.

Accountability does not exist in a vacuum. The military justice system is designed to promote good order and discipline, largely to serve and protect the honored principle of accountability.¹⁸³ The system strives to handle purely disciplinary questions in a purely disciplinary environment. Until the "chief legal officer" efforts of the early 1990s, the system remained, as it should be, relatively insulated from the political process. One of the great dangers of the "chief legal officer" and "controlling legal opinion" provisions of the Deputy Secretary of Defense memoranda is that the good-order-and-discipline system will be subject to influence and warping by the political process. To the extent that political overtones pervade this system, the principle of accountability will falter. Former Assistant Secretary of Defense and Secretary of the Navy, James Webb, speaking about the Tailhook scandal, made the following statement:

In the military the seemingly arcane concepts of tradition, loyalty, discipline and moral courage have carried the services through cyclical turbulence in peace and war. Their continuance is far more important than the survival of any one leader. *It is the function of the*

¹⁸²NAVY REGS. 1990, *supra* note 47, § 0802(1) (emphasis added).

¹⁸³Interview with Rear Admiral John E. Gordon, *supra* note 115.

military's top officers to articulate that importance to the civilian political process. And an officer who allows a weakening of these ideals in exchange for self preservation is no leader at all.

The implications from the forced retirement of ... two rear admirals, as well as a handful of related cases, suggest not that the Navy is getting tough on those who practice intolerance, but that *any accusation with political overtones will be treated as a conviction.* ...¹⁸⁴

If the President's administration has a "right and perhaps a duty to impose its ideas and policies"¹⁸⁵ on the Department of Defense, every possible step should be taken to ensure that legal services are structured to *support and enhance* good order and discipline in the military. Absent a balance in the delivery of those legal services—that is, absent the "independent military perspective"—military decision-makers often will tend to resolve issues on the basis of politics instead of good order and discipline.

Accordingly, the process of formulating broad legal policies at the political-appointee level should be separate from the process of implementing and executing those policies in the field or fleet. The framework of the military justice system facilitates this separation. To the extent that the "chief legal officer" and "controlling legal opinion" provisions of the Deputy Secretary of Defense memoranda obscure the distinction between the subjectivity inherent in policy formulation, and the goal of objectivity in enforcing good order and discipline, they are unwise from a public policy perspective.

IV. Conclusions and Recommendations

My experience in government is that when things are non-controversial, beautifully coordinated and all the rest, it must be that there is not much going on.

—John F. Kennedy

A. Conclusions

The goal shared by every official involved in military policy-making is to structure the military legal system to provide sound, impartial legal advice to officials in the Department of Defense

¹⁸⁴N.Y. TIMES, Oct. 6, 1992, at A23 (emphasis added).

¹⁸⁵See *supra* note 163.

and the military departments, and to military operational commanders.¹⁸⁶ This concept should be the starting point of analysis.

The provisions of the three Department of Defense efforts of the early 1990s to make the general counsel of the military departments their respective “chief legal officer,” with the authority to render “controlling legal opinions,” have pushed the military legal systems into uncharted territory. Contrary to one of the apparent objectives of these efforts, the provisions have confused—rather than clarified—the relationship between the judge advocate generals and the general counsel of the military departments. The single greatest source of confusion is the meaning of the term “chief legal officer.” Possible meanings of the term, as depicted below, may range on a continuum from the very benign to the very authoritative:

**Degree of Military Department General Counsel Control
Over Judge Advocate General as Afforded by "Chief Legal Officer"
and "Controlling Legal Opinion" Provisions**

Least Degree of Control		Greatest Degree of Control
Protocol Only	Limited to Respective Areas of Expertise	Full Control

Although legislative history fails to define the term, “chief legal officer,” and decision-makers cannot agree on its meaning, some clues indicate that proponents of the three Department of Defense efforts of the early 1990s intended its meaning to appear on the far right side of the continuum. Most noteworthy among these clues is the modeling of the “chief legal officer” provision after the same provision of the Department of Defense General Counsel statute, which points toward “full control” of the judge advocate generals by the military department general counsel. A military department general counsel’s legal opinion would be binding on that service’s judge advocate general; a military department general counsel would be empowered to use the resources of that service’s judge advocate general for any purpose; and a military department general counsel would be empowered to intervene in any legal issue pending before that service’s judge advocate general if the general counsel believed the issue was of general concern to the military department or that department’s secretary.

¹⁸⁶ See *supra* part I.B.

Despite these clues, however, several factors that limit the scope of a rational definition of the terms "chief legal officer" and "controlling legal opinion" tend to push their meanings far to the left, benign side of the continuum. A "right side" definition of the terms is inconsistent with the Goldwater-Nichols Act's rejection of full integration of military and civilian staffs. Such a definition is equally inconsistent with the exclusion of the military department secretaries from the operational chain of command. Moreover, the Secretary of Defense's authority to impose a "right side" definition is doubtful. Finally, adopting a "right side" definition clearly would undercut the statutory authorities of the military department secretaries and the judge advocate generals. Accordingly, several substantial factors inhere against an adoption of a "right side" definition.

Perhaps more important than the reasons weighing against a "right side" definition of the terms, "chief legal officer" and "controlling legal opinion," are the normative reasons for adopting a "left side" interpretation of these terms. Modeling the organization of the military departments after the structure of the Department of Defense does not make good sense because of their tremendously different evolutions and missions. Moreover, the provisions add at least one more layer of bureaucracy to the legal process, calling into question the finality of judge advocate general opinions with no apparent benefit. This loss of repose in military legal decision-making reduces organizational effectiveness and efficiency, and detracts from accomplishment of the military mission. Furthermore, while civilian control of the military is dogmatic, it neither justifies, nor is enhanced by, the "chief legal officer" and "controlling legal opinion" provisions.

From a public policy perspective, a "right side" interpretation of the provisions will cause the filtering of a judge advocate general's opinion and advice through a political prism. This filtering will increase the likelihood that politics improperly could influence the provision of legal advice and services within the military departments and to military operational commanders. Moreover, it will superimpose the authority of attorneys working for the military department general counsel over judge advocates who practice in the specialized area of military law—an area of the law in which the organizations supporting military department general counsel lack not only facilitative structure, but also personnel with adequate training and experience. Finally, the "right side" interpretation tends to merge legal policy formulation and execution and encourages, or at least allows, political solutions to nonpolitical questions. Accordingly, it will create

inevitable conflicts of interest for the military department general counsel, and weaken considerably the important concept of "accountability" in the military service.

Consequently, authoritative interpretations of the "chief legal officer" and "controlling legal opinion" provisions contained in the Deputy Secretary of Defense memoranda manifest the substantial problems in shifting toward a hierarchal relationship between the civilian general counsel and military judge advocate general organizations in the armed services. On the other hand, by adopting the "left side" interpretations of the terms—that is, adopting benign definitions that acknowledge these organizations' common goal and reinforce their parity—these problems diminish tremendously. More importantly, the problems that derive from "right side" interpretations of these terms demonstrate the benefits of actually buttressing these organizations' cooperative and mutually supportive relationship, and of clarifying and delineating the respective roles and functions of the judge advocate generals and the military department general counsel.

B. Recommendations

First: Maintain the distinct general counsel and judge advocate general organizations in each of the military departments.

Second: Generally describe the functional areas assigned to the general counsel and the judge advocate generals in statute, and clarify who—the general counsel or the judge advocate generals—shall bear the primary responsibility and accountability in those functional areas. A starting point for the Navy, for example, would be the current "division of labor" under Navy regulations.¹⁸⁷ As each of the military departments has evolved differently with respect to "division of labor" between the general counsel and the judge advocate general, the statutory language would have to be tailored accordingly. Further, clarify that supervision over the general counsel and the judge advocate general in the performance of duties in those functional areas shall be subject to the direction of only the secretary and the chief of staff of the particular military department.

Third: Take one of the following three approaches to the terms "chief legal officer" and "controlling opinion": (1) eliminate the terms altogether as they apply to military department general counsel; (2) clarify them by statute to apply only to the general counsel's statutorily-defined functions; or (3) change the term

¹⁸⁷NAVY REGS. 1990, *supra* note 47.

"chief legal officer" to "senior legal advisor," which will imply a matter of protocol (left side of the continuum) instead of a matter of authority and control (right side of the continuum).

Fourth: Study the value of statutorily designating the judge advocate generals as the lawyers to the military departments' chiefs of staff and as the military justice counsel to their respective department secretaries. Concomitantly, study the value of statutorily designating the general counsel as the lawyers to the military department secretaries for all matters except of cases involving military justice functions. These designations essentially would make the general counsel "chief legal officers" for matters under the cognizance of the military department secretaries except military justice matters, and would make the judge advocate generals the "chief legal officers" for matters under the cognizance of the military department chiefs of staff. Likewise, the Staff Judge Advocate to the Commandant of the Marine Corps would be the "chief legal officer" for matters under the cognizance of the Commandant. Effecting these redesignations would require several steps. First, the Navy Judge Advocate General must be removed from the Office of the Secretary of the Navy.¹⁸⁸ This change would remodel the Navy's legal services framework after the organizations that already exist in the Office of the Secretary of the Army¹⁸⁹ and the Office of the Secretary of the Air Force¹⁹⁰. Second, the statutory provision that makes The Judge Advocate General of the Army the "legal advisor of the Secretary of the Army"¹⁹¹ must be abolished. Finally, all of the affected military department regulations must be modified to accommodate these redesignations.¹⁹²

The Department of Defense needs the services of both civilian general counsel attorneys and uniformed judge advocates. Congress wisely has provided for both, and each organization has evolved to take advantage of its relative training, experience, and expertise. Their structural evolutions, however, do not indicate that either one of these organizations should oversee, supervise, or control the other as "chief legal officer." To the contrary, the

¹⁸⁸ 10 U.S.C. § 5014(b)(4) (1988).

¹⁸⁹ *Id.* § 3014(b).

¹⁹⁰ *Id.* § 8014(b).

¹⁹¹ *Id.* § 3037(c)(1).

¹⁹² The Army would need to modify Gen. Orders No. 17, *supra* note 36, which currently designates the Army General Counsel as the "chief legal officer" of the Department of the Army. The Air Force would need to modify SECAF Order 111.1, *supra* note 44, which currently designates the Air Force General Counsel as the "final legal authority" on all nonmilitary justice matters arising in the Department of Air Force. The Navy's current designation of the Navy General Counsel as the "principal legal advisor to the Secretary" would stand.

Department of Defense historically has benefitted most from a cooperative and mutually supportive relationship between the two organizations. Changing this relationship would detract from their common goal of providing effective military legal services and sound, impartial military legal advice—a goal whose achievement is essential to accomplishing virtually every modern military mission.

REASON, RETALIATION, AND RHETORIC: JEFFERSON AND THE QUEST FOR HUMANITY IN WAR

BURRUS M. CARNAHAN*

*[The Old World imagined the Enlightenment and the New World realized it. The Old World invented it, formulated it, and agitated it; America absorbed it, reflected it and institutionalized it.]*¹

I. Introduction

Few did more than Thomas Jefferson to institutionalize the enlightenment in America. From politics and law to education and architecture, his ideas touched almost every aspect of early American culture. One part of his career, however, largely has gone unnoticed. From 1775 to 1785, he was deeply involved in efforts to humanize the eighteenth century law of war.

During his first term in the Continental Congress, Jefferson concluded that appeals to reason and threats of retaliation, would compel British authorities to improve the treatment of American prisoners of war. Later, as Governor of Virginia from 1779 to 1781, he would attempt to apply this strategy in practice. At the same time, he was faced with the new problem of ensuring that British prisoners in Virginia were treated properly under the laws and customs of war. After the Revolution, he drew on his experiences as Governor, and joined Benjamin Franklin in promoting a new diplomatic strategy for protecting prisoners and civilians. The results of this approach, however, also proved to be disappointing.

II. The Law of War as Jefferson Found It

The eighteenth century now is regarded as an era of limited war, during which an army typically would fight in a restrained,

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¹Henry Commager, *America and the Enlightenment, in* JEFFERSON, NATIONALISM AND THE ENLIGHTENMENT 3 (1975).

chivalrous, and civilized manner.² Relying on the law of nature as revealed by reason, Jean-Jacques Rousseau argued in a famous passage that war should be considered a relationship between sovereigns, and not their peoples. Prisoners of war and unarmed civilians should be affected very little by the wars of their sovereigns.³

Rousseau, however, was not an authority on the law of nations. Legal treatises from his era disclose a more confused situation.⁴ One authority, Emmerich Vattel, believed that Rousseau's ideals had been incorporated into positive law. These salutary restraints had arisen because "at present, war is carried on by regular troops," with the result that "the people, the peasants, the citizens take no part in it and generally have nothing to fear from the sword of the enemy."⁵

²See REGINALD STUART, *WAR AND AMERICAN THOUGHT* 16 (1982).

³See Jean-Jacques Rousseau, *The Social Contract*, in 38 GREAT BOOKS OF THE WESTERN WORLD 387, 390 (G. Cole trans., 1952):

War then is a relation, not between man and man, but between State and State, and individuals are enemies only accidentally, not as men, nor even as citizens, but as soldiers; not as members of their country, but as its defenders. ... The object of war being the destruction of the hostile State, the other side has the right to kill its defenders while they are bearing arms; but as soon as they lay them down and surrender, they cease to be enemies or the instruments of the enemy, and become once more simply men, whose life no one has the right to take. ... These principles are not those of Grotius; they are not based on the authority of poets, but derived from the nature of reality and based on reason.

⁴According to Vattel, whose work on the law of nations was used widely in early America, obligations under the law of nations derived from both the "necessary law," which was dictated by reason and natural law and was inherently binding by its nature, and from positive law. The positive law of nations, in turn, was composed of three elements: custom, treaties, and the "voluntary" law of nations. The law of war primarily was embodied in custom and voluntary law. See EMMERICH VATTEL, *THE LAW OF NATIONS*, lviii, lxiv—lxvi (J. Chitty ed., 1855) (1758). The voluntary law of nations—no longer recognized as a source of modern international law—comprised a set of "unilateral restraints," which European states adopted as a "necessary result of their respect of the independence of other nations." These restraints served primarily as support for the legal fiction under which all sides in a war between European powers were regarded as waging a "just war," even though logically only one could have had a just cause for fighting. *Id.* at lxiv. A similar structure was used by Secretary of State Jefferson in his 1793 opinion for President Washington. He dropped the concept of "voluntary" law, but otherwise used the following elements noted by Vattel: "The Law of nations ... is composed of three branches. 1. The Moral law of our nature. 2. The Usages of nations. 3. Their special Conventions. Opinion on the French Treaties, Apr. 28, 1793, in THOMAS JEFFERSON, *WRITINGS* 422-23 (Library of America ed., 1984).

⁵See VATTEL, *supra* note 4, at 351-52. Vattel agreed with Grotius that assassination and the use of poison in war were contrary to both customary law and the law of nature. Those who look solely at Vattel's work may form an erroneously optimistic view of the humanity and enlightenment of the eighteenth century law of war. See, e.g., George Coil, *War Crimes of the American Revolution*, 82 MIL. L. REV. 171, 185 (1978).

The optimism shared by Rousseau and Vattel was not universal. Whereas one saw the clear dictates of reason and the other found binding rules of law, many authorities saw only confusion and cruelty, alleviated by occasional acts of generosity. For instance, Cornelius van Bynkershoek declared that "every force is lawful in war. So true is this that we may destroy an enemy though he be unarmed, and for this purpose we may employ poison, an assassin or incendiary bombs ... in short, everything is legitimate against an enemy."⁶ It was still "lawful to hang prisoners of war," though Bynkershoek conceded that this was no longer a common practice.⁷ Perfidy, the violation of an express promise or agreement between the parties to a conflict, was the only act that Bynkershoek regarded as strictly forbidden in war.⁸ For example, a common stipulation in commercial treaties of the period—a breach of which would have constituted perfidy—provided that if war broke out between the signatories, the citizens of each nation would be allowed a set period in which to wind up their affairs in the other party's territory.⁹

Christian Wolff stood somewhere between Vattel and Bynkershoek in his view of what was unlawful in war. While the law of nature dictated that a prince fighting a just war neither should kill, nor should injure, the noncombatant subjects of his enemy, Wolff noted that the "customs of certain nations" gave a "general license" to kill all enemy subjects. Unlike Vattel, Wolff regarded assassination, the use of poison, the plundering of private property, and the destruction of "flour and food and drink" permissible under the law of nature.¹⁰

Pufendorf, like Wolff, based his system on the law of nature as revealed by reason. To him, however, reason dictated fewer restraints on those fighting a just war than it did to Wolff. In Pufendorfs view, the parties were allowed "to use force to any degree or so far as [they] think desirable."¹¹

⁶CORNELIUS VAN BYNKERSHOEK, *QUAESTIONUM JURIS PUBLICI LIBRI Duo* 16 (T. Frank trans., Oceana 1964) (1737).

⁷*Id.* at 27.

⁸*Id.* at 16.

⁹*Id.* at 28-29. John Adams, for example, included such a provision in article XXIII of the "Model Treaty" he drew up for the Continental Congress in 1776. 4 PAPERS OF JOHN ADAMS 284 (R. Taylor ed., 1979) ("six months after the proclamation of war shall be allowed to the merchants ... for settling and transporting their goods"). Adams took this provision from the Treaty of Utrecht of 1713, between France and Great Britain. *Id.* at 263.

¹⁰See C. WOLFF, *THE LAW OF NATIONS TREATED ACCORDING TO A SCIENTIFIC METHOD* 409-50 (F. Hemelt trans., Oceana 1964) (1764).

¹¹See S. PUFENDORF, *THE LAW OF NATURE AND OF NATIONS* 1298 (C. & W. Oldfather trans., Oceana 1964).

III. Sources of Jefferson's Approach to the Law of War

Because of the diversity of views, a statesman in Jefferson's era would face a bewildering variety of opinions whenever he consulted leading writers on a problem under the laws and customs of war. Jefferson's efforts to reconcile these views, or to find his own path to reason and humanity in war, reflected many different influences. Some of his reasoning was common to most educated men of that era, but much of his thinking was unique.

Jefferson's education and experience as a lawyer were perhaps the greatest influences on his thoughts. From 1767 to 1774, Jefferson practiced before the Virginia Governor's Council—both in its capacity as the colony's highest court of common law and equity (the General Court) and as the royal governor's privy council.¹² This experience impressed upon him—as it would have impressed upon any good lawyer—the value of careful drafting, the significance of textual analysis in documents, and the importance of technical distinctions. He also sought out the historical origins of English legal rules and institutions, taking an antiquarian's delight in ferreting out the allegedly Anglo-Saxon roots of the common law. Jefferson regarded these early English institutions as more appropriate for a free people than the monarchical institutions created by the Normans.¹³

¹²See FRANK DEWEY, THOMAS JEFFERSON, LAWYER 18-19, 22-23 (1986). The council consisted of twelve eminent Virginians, who advised the royal governor and served at his pleasure. Few had any legal training. Sitting as members of the colonial privy council, they heard a variety of issues that today would be classified as matters of administrative law—matters such as the validity of land patents and disputes over local offices. Practice before this body undoubtedly acted as a check on Jefferson's tendency to become immersed in scholarly subtleties, and must have required him to reinforce technical arguments with others based on sound policy and common sense wherever possible. On Jefferson's immersion in the technicalities of the law as a student under George Wythe, see DUMAS MALONE, JEFFERSON THE VIRGINIAN 67-73 (1948). When suited to a particular case, Jefferson could demonstrate a mastery of the legal scholarship of his time. In particular, the written arguments in an arbitration case, in which Jefferson opposed his old teacher, Wythe, displayed "enormous erudition" on both sides. DEWEY, *supra*, at 24. In addition, Jefferson was fully capable of using a comparative law approach. An outline written to prepare for a divorce petition to the Virginia legislature cited Jewish, Roman, Greek, Celtic, Turkish, and Prussian laws and practices. *Id.* at 70-72.

¹³"Jefferson had some of the instincts of an antiquary, for whom the past was a rich miscellany of marvels and mysteries." Marcus Cunliffe, *Thomas Jefferson and the Dangers of the Past*, 6 WILSON Q. 96, 104 (1982). Jefferson's draft bill to revise Virginia criminal law, for example, is heavily footnoted to Anglo-Saxon laws and precedents, upon which he relied far more heavily than on Enlightenment writers such as Beccaria. See A Bill for Proportioning Crimes and Punishments, in THOMAS JEFFERSON, WRITINGS, *supra* note 4, at 349-64. Jefferson derived his idealized view of the Anglo-Saxons from the eighteenth century English Whigs, and from the seventeenth century English "Commonwealth men," who had resisted royal power under the Stuarts. See HENRY MAY, THE ENLIGHTENMENT IN AMERICA 288, 293 (1976); Cunliffe, *supra*, at 104.

Distaste for the medieval past, whether reflected in Gothic architecture or Norman feudal law, was another recurring theme in Jefferson's thoughts. The relatively bright light of ancient civilization had been followed by darkness and superstition in the Middle Ages. In his own time, this darkness was being succeeded by an age of reason that promised to be far more brilliant than anything that had gone before.¹⁴

Coupled with reason, Jefferson drew from the Scottish Enlightenment a belief that an innate moral sense existed in each individual.¹⁵ Reason and the moral sense were the chief source of the law of nature—itself a source of the law of nations. In 1793, Jefferson wrote that the "moral law of our nature" was the first of the main "branches" of the law of nations.

The first of these ... is ... the Moral law to which Man has been subjected by his creator, & of which his feelings, or Conscience as it is sometimes called, are the evidence with which his creator has furnished him. ... For the reality of these principles I appeal to the true fountains of evidence, the head & heart of every rational and honest man.¹⁶

This innate moral sense provided a means by which a statesman, using human reason, might reconcile conflicting legal opinions.

Questions of natural right are triable by their conformity with the moral sense & reason of man. Those who write treatises of natural law, can only declare what their own moral sense & reason dictate in the several cases they state. Such of them as happen to have feelings & a reason coincident with those of the wise & honest part of mankind, are respected and quoted as witnesses of what is morally right or wrong in particular cases. Grotius, Pufendorf, Wolf, & Vattel are of this number. But where they differ, & they often

¹⁴See Cunliffe, *supra* note 13, at 102-03.

¹⁵As a man of the enlightenment who believed in the application of reason to society as well as to nature, Jefferson throughout his life pursued the use of reason as the means by which mankind could obtain a more perfect society. NOBEL CUNNINGHAM, IN PURSUIT OF REASON: THE LIFE OF THOMAS JEFFERSON xv (1987). On the "moral sense" and the impact of Scottish thinkers on Jefferson and America, see KARL LEHMANN, THOMAS JEFFERSON, AMERICAN HUMANIST 131-34 (1985); MAY, *supra* note 13, at 344-46. Lord Kames apparently was especially influential on Jefferson. See LEHMANN, *supra*, at 131-34; cf. CUNNINGHAM, *supra*, at 29, 49.

¹⁶Opinion on the French Treaties, Apr. 28, 1793, in THOMAS JEFFERSON, WRITINGS, *supra* note 4, at 422-23.

differ, we must appeal to our own feelings and reason to decide between them.¹⁷

Conflicting international usages and customs might be reconciled similarly by assuming that, despite occasional setbacks, "the movement of history was progressive."¹⁸ Early in his first term as President, for example, the United States faced the problem of maintaining its neutrality in the Napoleonic Wars, including the right of American ships to carry cargo belonging to belligerents. Jefferson advised the American minister to France to assert this right on behalf of the United States by distinguishing between ancient customs and more reasonable recent practices. The interplay of custom, progress, reason, and morality in Jefferson's thinking on the law of nations clearly is revealed by the following passage from his letter to the minister:

When Europe assumed the general form in which it is occupied by the nations now composing it, and turned its attention to maritime commerce, we found among its earliest practices, that of taking the goods of an enemy from the ship of a friend; and that into this practice every maritime State went sooner or later, as it appeared on the theater of the ocean. If, therefore, we are to consider the practice of nations as the sole & sufficient evidence of the law of nature among nations, we should unquestionably place this principle among those of natural laws. But its inconveniences, as they affected neutral nations peaceably pursuing their commerce, and its tendency to embroil them with the powers happening to be at war, and thus to extend the flames of war, induced nations to introduce by special compacts, from time to time, a more convenient rule, that "free ships should make free goods;" and this latter principle has by every maritime nation of Europe been established, to a greater or less degree, in its treaties with other nations; insomuch, that all of them have, more or less frequently assented to it, as a rule of action in particular cases. Indeed, it is now urged, and I think with great appearance of reason, that this is genuine principle dictated by national morality; & that the first practice arose from accident, and the particular convenience of the States which first figured on the water, rather than from well-digested reflections on the relations of friend and enemy, on the rights of

¹⁷*Id.* at 428.

¹⁸Cunliffe, *supra* note 13, at 102.

territorial jurisdiction, & on the dictates of moral law applied to these.¹⁹

Faith in reason, fortified by the innate moral sense, initially led Jefferson to believe that he successfully could promote continual improvements in the treatment of prisoners of war and civilian war victims. His belief in progress, reinforced by suspicions of the feudal past, sometimes led him to discount ancient customs and usages of war. Instead, he stressed the importance of modern, eighteenth-century practices, even though many of his contemporaries adhered to them only intermittently.

IV. The Case of Ethan Allen: Reason and the Theory of Retaliation

Jefferson first had occasion to deal with the laws of war in late 1775, when, while serving in the Continental Congress, he took up the case of Colonel Ethan Allen. After taking Fort Ticonderoga from the British on July 10, 1775, Colonel Allen had attempted the capture of Montreal. Defeated and taken prisoner, his captors ordered that he be treated with the "utmost severity." He was placed in irons weighing thirty pounds and held on the lowest deck of a warship. Allen later was taken to England for trial as a traitor.²⁰ Jefferson had the task of drafting a resolution protesting Allen's treatment, for delivery to General Howe.

Jefferson began this task by paraphrasing the sentiments of Rousseau and Vattel on the treatment of prisoners of war:

It is the happiness of modern times that the evils of necessary war are softened by refinement of manners and sentiment, and that an enemy is an object of vengeance, in arms and in the feild [sic] only. It is with pain we hear that Mr. Allen and others taken with him while fighting bravely in their country's cause, are sent to Britain in irons, to be punished for pretended

¹⁹Letter to the U.S. Minister to France, Sept. 9, 1801, in THOMAS JEFFERSON, WRITINGS, *supra* note 4, at 1090, 1091-92. In a marginal note, Jefferson identified the "States which first figured on the water" as Venice and Genoa. *Id.*

²⁰See RICHARD GARRETT, P.O.W. 39-41 (1981); Coil, *supra* note 5, at 185. Allen eventually was returned to America and exchanged for a British officer held by the Continental forces. Entirely aside from the issue of treason, the British appeared to have entertained doubts about whether or not Allen was entitled to treatment as a prisoner of war under the laws of war. Allen allegedly was wearing a Canadian uniform when captured. See GARRETT, *supra*, at 40. He also lost his status as an officer when his militia unit elected a new colonel to replace him, and he had been declared an outlaw by the colony of New York during an earlier dispute over land rights. Coil, *supra* note 5, at 185 n.56.

treasons; treasons created by those very laws whose obligation we deny, and mean to contest by the sword. This question will not be decided by reeking [sic] vengeance on a few helpless captives, but by atchieving [sic] success in the fields of war.²¹

Jefferson's draft appealed to modern European practice against older customs that allowed prisoners to be treated as criminals or slaves. Reason, as the basis of modern practice, makes its appearance in the last sentence of the quoted passage, in which Jefferson explains that cruelty to prisoners is unreasonable because it has no impact on the military outcome of the war.

The Revolution already had seen one precedent for Jefferson's appeal to reason. Earlier in 1775, Benjamin Franklin, another prominent exponent of Enlightenment thinking, had appealed to reasoned self-interest when he denounced the conduct of the British forces to his English friends.

[Britain] has begun to burn our seaport towns; secure, I suppose, that we shall never be able to return the outrage in kind. She may doubtless destroy them all; but if she wishes to recover our commerce, are these the probable means? She must certainly be distracted; for no tradesman out of Bedlam ever thought to increasing the number of his customers by knocking them on the head; or of enabling them to pay their debts by burning their houses.²²

When the issue became the treatment of prisoners of war, however, America did have means "to return the outrage in kind." Jefferson's principal biographer noted that Jefferson could be "relentless whenever he believed the rights of humanity had been violated."²³ This side of Jefferson's character is reflected prominently in the draft resolution on the treatment of Ethan Allen. Its appeal to reason and modern manners was reinforced by specific threats of retaliation:

Should you think proper in these days to revive antient [sic] barbarism, and again disgrace our nature with the practice of human sacrifice, the fortune of war has put into our power subjects for multiplied retalia-

²¹Draft of a Declaration on the British Treatment of Ethan Allen, Jan. 2, 1776, *in* 1 PAPERS OF THOMAS JEFFERSON 276 (Julian Boyd ed., 1950).

²²Letter to Joseph Priestley, July 7, 1775, *in* BENJAMIN FRANKLIN, WRITINGS 904-05 (Library of America ed., 1987); *cf.* Letter to Jonathan Shipley, July 7, 1775, *in* BENJAMIN FRANKLIN, THE AUTOBIOGRAPHY AND OTHER WRITINGS 268-72 (L. Lemisch ed., 1961).

²³MALONE, *supra* note 12, at 292.

tion. To them, to you, and to the world we declare they shall not be wretched, unless their imprudence or your example shall oblige us to make them so; but we declare also that their lives shall teach our enemies to respect the rights of nations. We have ordered Brigadier General Prescott to be bound in irons, and confined in close jail, there to experience corresponding miseries with those which shall be inflicted on Mr. Allen. His life shall answer for that of Allen, and the lives of as many others for those of the brave men captivated with him.²⁴

Accordingly, reason did not always call for mercy to a captured enemy. If retaliation was necessary, reason could dictate ruthlessness. This passage clarifies that Jefferson saw the importance of reciprocity and retaliation as a means to secure enemy restraint in war. He was not, however, the originator of retaliation as an American policy. In August 1775, General Washington already had warned the British commanding general that American policy towards British prisoners of war would parallel British treatment of American prisoners.²⁵

That General Prescott ever suffered for the mistreatment of Ethan Allen was unlikely. The Congress debated Jefferson's proposal, and even made changes to the text, but never adopted it.²⁶ Nevertheless, Colonel Allen eventually was returned to America and exchanged.²⁷ To Jefferson, this episode may have demonstrated not only the need for restraint in dealing with the enemy's misconduct, but also the importance of being prepared to

²⁴Draft of a Declaration on the British Treatment of Ethan Allen, *supra* note 21.

²⁵See LARRY BOWMAN, *CAPTIVE AMERICANS 15-16, 82 (1976)*; GEORGE LEWIS & JOHN MEWHA, *HISTORY OF PRISONER OF WAR UTILIZATION BY THE UNITED STATES ARMY 2 (1955)*.

²⁶See Note, 1 PAPERS OF THOMAS JEFFERSON, *supra* note 21, at 276; 4 JOURNALS OF THE CONTINENTAL CONGRESS 22-23 (Worthington Ford ed., 1906) (citing revisions made by the Congress, but not reflecting actual votes). A copy of the resolution in the papers of the Continental Congress is endorsed "Motion of Col. Harrison, Jan'y 2, 1776, postponed." *Id.* at 23 n.1. The Congress did not approve a general policy of retaliation against prisoners until January 21, 1778, when it voted to instruct General Washington to retaliate in kind against British officers for mistreatment of American officers in English hands. See 10 JOURNALS OF THE CONTINENTAL CONGRESS, *supra*, at 80-81. On September 19, 1778—after France entered the war on America's side—John Adams and Benjamin Franklin, the American diplomats at the French court, prepared a letter to "American Prisoners in England," asking them to "keep us informed on the precise conditions of your captivity so we may enforce the same provisions" against British prisoners being held in France. 27 THE PAPERS OF BENJAMIN FRANKLIN 422-23 (W. Willcox ed., 1987). This letter, however, never was sent—perhaps because of French reluctance to cooperate.

²⁷See Note, 1 PAPERS OF THOMAS JEFFERSON, *supra* note 21, at 276; GARRETT, *supra* note 20, at 41.

retaliate. The willingness of Washington and the Congress to even consider retaliation may have been enough to affect the British authorities in Canada. Jefferson believed that, at least, a change in policy had occurred after Allen's capture. Later in the war, he wrote to a British general who had served in Canada, stating that "... in that quarter, we have reason to believe that [Sir] Guy Carleton, and the other officers commanding there, have treated our prisoners (since the instance of Colo[nel] Allen) with considerable lenity."²⁸

V. Advocate for the Convention Army: Humanity and the Public Honor

At the beginning of 1777, Jefferson was forced to deal with prisoners of war on a more personal and immediate level. Far enough from the sea to prevent rescue by the Royal Navy, his home county, Albemarle, was considered a safe location for political prisoners and prisoners of war. As county lieutenant, Jefferson was placed in charge of the first handful of prisoners, though the Continental Congress assumed responsibility for them after a few months.²⁹ Two years, later Albemarle County and its lieutenant became involved with the fate of a far larger group of enemy prisoners.

General Burgoyne's army of over 5000 British regulars and German mercenaries surrendered to the Americans at Saratoga, New York, on October 17, 1777. The surrender agreement, known as the Convention of Saratoga, provided that the prisoners would be allowed to return to England provided they no longer served against America.³⁰ Soon after the Convention was signed, however, both sides began to seek ways to evade its terms. Execution of the Convention became embroiled in other disputes over the treatment and exchange of prisoners. At one point, Lord Howe, the British commanding general for North America, secretly ordered Burgoyne to have his troops sail to New York—not England—after leaving Boston. In New York, they were to join the British garrison as substitutes for English prisoners that Howe believed Washington wrongly had refused to release in an earlier exchange.³¹

²⁸Letter to Major General William Phillips, July 22, 1779, 3 PAPERS OF THOMAS JEFFERSON, *supra* note 21, at 44.

²⁹See 2 PAPERS OF THOMAS JEFFERSON, *supra* note 21, at 5, 31-33.

³⁰See Convention between Lieutenant-General Burgoyne and Major General Gates, Saratoga, 1777 [hereinafter Saratoga Convention], in G. HOWSON, BURGoyNE OF SARATOGA 295-97 (1979).

³¹See *id.* at 249.

The Convention of Saratoga also provided that the baggage of the officers was not to be searched, "General Burgoyne giving his Honour that there are no public Stores secreted therein."³² Despite Burgoyne's word, the military chest—that is, cash carried by the army for official expenditures—was distributed among his army before surrender to keep it from becoming booty of war for the Americans.³³

The most serious breach of the Convention of Saratoga, however, must be attributed to the Continental Congress. Many of its members recognized that returning Burgoyne's army to Britain would release other troops for service against America. The Congress?therefore, searched for almost any excuse to delay repatriation under the terms of the Convention. In the end, the Congress refused to allow the prisoners to leave American control until the Convention had been ratified by Parliament. Because ratification would have given at least tacit recognition to the United States, Parliament took no action on the Convention. Consequently, the so-called Convention Army remained in American custody until the end of the war.³⁴

Initially, the Americans held their captives in camps near Boston. The Massachusetts government, however, eventually

³²*Id.* at 296 (citing Article 6 of Convention between Lieutenant-General Burgoyne and Major General Gates).

³³*See id.* at 249. Today, as in the eighteenth century, "[a]ll enemy public movable property captured or found on a battlefield becomes the property of the capturing State." DEF'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE 24 (July 1956) [hereinafter FM 27-10]. Now, as then, money belonging to a prisoner of war remains his or her property and the capturing power must give a prisoner receipts and account for any sums taken from him or her. *See* Geneva Convention (III) on Prisoners of War, art. 18, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135. Nevertheless, "[t]he unexplained possession by a prisoner of war of a large sum of money justifiably leads to the inference that such funds are not his own property and are in fact either property of the enemy government or property which has been looted or otherwise stolen." FM 27-10, *supra*, at 95; *cf.* HOWARD LEVIE, PRISONERS OF WAR IN INTERNATIONAL ARMED CONFLICT 114-15, reprinted in 59 U.S. NAVAL WAR C. INT'L L. STUD. (1978). By prohibiting searches of an officer's baggage, the Convention of Saratoga prevented discovery of any suspiciously large sums of money in his possession.

³⁴On January 8, 1779, the Continental Congress resolved that the Convention of Saratoga had "not been strictly complied with" by the British, that just grounds existed to fear that General Burgoyne would repudiate the Convention, and that "the embarkation of Lieutenant General Burgoyne, and the troops under his command, be suspended until a distinct and explicit ratification of the [C]onvention of Saratoga shall be properly notified by the court of Great Britain to Congress." 10 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 26, at 34-35. Knowing that the British had repudiated a similar convention during the Seven Years' War—and suspecting that if they were allowed to leave Boston, Burgoyne's army soon would end up in New York—General George Washington was one of the principal proponents of finding any excuse or evasion to prevent the return of that army to British control. *See* JAMES FLEXNER, GEORGE WASHINGTON IN THE AMERICAN REVOLUTION 245-46 (1968).

demanding that the southern states share the economic and social costs of supporting the Convention Army in their midst. Accordingly, in October 1778, the Continental Congress decided to move the prisoners to western Virginia. This area was less populated than New England and sufficiently distant from the sea to prevent rescue by the Royal Navy. After a winter march of 680 miles, the Convention Army—reduced to 4000 members by disease and desertion—reached Charlottesville, Virginia, in January 1779.

What remained of Burgoyne's army arrived in a condition of considerable misery, and few preparations had been made for them in Virginia. Forced to build their own barracks, the troops found that much of the food initially issued to them was spoiled. After only a few weeks, rumors began to circulate that the Convention Army would be split apart and moved to different locations—perhaps to other states.³⁵

At this point, Jefferson decided to intervene in the interests of humanity. His intervention took the form of a personal letter to the Governor of Virginia, Patrick Henry. This letter is an extraordinary document in the history of the law of war. In it, a prominent citizen of a belligerent state effectively presented a legal brief on behalf of a group of enemy prisoners, defending the group's case by appealing in the alternative to positive law, national interest, and natural law.

Jefferson began his appeal with an argument based on the text of the already badly battered Convention of Saratoga. Whatever Congress might do, Jefferson believed his own state of Virginia scrupulously must implement the terms of an agreement with the enemy. In an era when even experts could not agree on universal standards for the treatment of prisoners of war, the exact terms of surrender took on great importance. Jefferson called to Governor Henry's attention the possibility that dispersing the Convention Army to different states, or even to several

³⁵Not until the adoption of the Geneva Convention (III) on Prisoners of War, *supra* note 33, did international law establish general standards for the movement of prisoners of war between camps.

[T]ransfer of prisoners of war shall always be effected humanely and in conditions not less favorable than those under which the forces of the detaining power are transferred. Account shall always be taken of the climactic conditions to which the prisoners of war are accustomed and the conditions of transfer shall in no case be prejudicial to their health.

Id. art. 46. The "Detaining Power"—that is, the belligerent nation which is holding the prisoners—expressly is required to provide sufficient food, water, clothing, shelter, and medical attention. *Cf. id.* art. 20 (establishing similar standards for initial evacuations from the combat zone).

camps within Virginia, might violate the Convention by separating some of the troops from their ranking British and German officers, Generals Phillips and Riedesel.³⁶

By an article in the convention of Saratoga it is stipulated on the part of the United States that the officers shall not be separated from their men. I suppose the term officers includes general as well as regimental officers. As there are General officers then who command all the troops, no part of them can be separated from these officers, without a violation of the article.³⁷

Jefferson's argument had two problems. The first was that the article in question included the qualifying phrase, "as far as circumstances will admit," which apparently attenuated much of its force as an obligation. To this, Jefferson replied that the phrase should be construed as allowing officers to be provided separate quarters commensurate with the privileges of their rank. Under any other construction, the result would be "that the qualification of the article destroyed the article itself and laid it wholly at our discretion." That result could not have been within the "contemplation of the parties" when the agreement was made, nor would it have been shared by "all the world beside who are ultimate judges in this case."³⁸

³⁶General Burgoyne had been permitted to return to England on parole prior to the march to Virginia. See GARRETT, *supra* note 20, at 47. Between the time of their arrivals in Charlottesville and the time of Jefferson's departure to serve as governor, Jefferson formed personal friendships with Phillips, Riedesel, and other officers of the Convention Army. See MALONE, *supra* note 12, at 293-97.

³⁷Letter to Patrick Henry, Mar. 27, 1779, 2 PAPERS OF THOMAS JEFFERSON, *supra* note 21, at 237. Article 7 of the Convention read as follows:

Upon the March and during the Time the Army shall remain in Quarters in Massachusetts Bay, the Officers are not, as far as Circumstances will admit, to be separated from their Men. The Officers are to be quartered according to Rank, and are not to be hindered from assembling their Men for Role-Callings, and other necessary purposes of Regularity.

Saratoga Convention, in HOWSON, *supra* note 30, at 296.

³⁸Letter to Patrick Henry, Mar. 27, 1779, 2 PAPERS OF THOMAS JEFFERSON, *supra* note 21, at 237. Interestingly, Jefferson, who usually has been associated with ideals of equality and democracy, relied on the general eighteenth century expectation that officers would receive preferential treatment in captivity. Jefferson's reliance undoubtedly was correct in this context because Article 7 of the Convention itself provided that the officers were to be quartered according to rank. See *supra* note 37. At the end of the century, the revolutionary government of France attempted to abolish distinctions between captured officers and enlisted personnel in granting paroles and other matters, and made officers and nobles the only prisoners subject to retaliation for mistreatment of captured French troops. See Decrees of 4 May and 16 Sept. 1792 of the French National Assembly on Prisoners of War, in DOCUMENTS ON PRISONERS OF WAR 10, 13 (Howard Levie ed., 1979), reprinted in 60 U.S. NAVAL WAR C. INT'L L. STUD.; Decree of 3 Aug. 1792 of

This argument drew on two traditional canons of statutory interpretation—that exceptions are not to be implied, and that provisos are to be strictly construed.³⁹ In the modern terminology of treaty interpretation, Jefferson was appealing to the principle of effectiveness; allowing the United States complete discretion in deciding what “circumstances” would permit the officers of the Convention Army to be separated from their men would make the article in question completely ineffective—a result that could not have been intended by the negotiators.⁴⁰

The second problem with Jefferson’s reliance on this article was procedural. According to rumor, the Continental Congress already had approved the proposal to separate and move part of the Convention Army. If that rumor were true, why should the government of Virginia, which was not a party to the Convention, question the interpretation adopted by Congress? “[The members of the] Congress indeed have admitted to this separation,” Jefferson conceded, “but are they so far lords of right and wrong as that our consciences may be quiet with their dispensation?”⁴¹ Even if Virginia was not formally a party to the Convention, its officials were bound by honor, and by the common moral sense, to prevent a breach of its terms, regardless of what the Congress did. Jefferson remarked,

As an American I cannot help feeling a most thorough mortification that our Congress should have permitted an infraction of our public honour; as a citizen of Virginia I cannot help hoping and confiding that our supreme Executive, whose acts are considered

the French National Assembly, *in id.* at 12. Napoleon restored distinctions of rank in the granting of paroles. *See* Imperial Decree of 4 Aug. 1811 Concerning Prisoners of War and Hostages, *in id.* at 17. The Geneva Convention (III) on Prisoners of War, *supra* note 33, continues to recognize a more privileged position for officer prisoners, and implicitly approves the practice of housing officers in camps separate from other troops. *See id.* arts. 44, 49.

The 1929 [Geneva] Convention [on Prisoners of War] did not provide for officers to be interned in special camps (or, in the absence of special camps, in buildings separate from the quarters assigned to other ranks). In fact, however, separate accommodation was always provided for officers by belligerents in the First and Second World Wars, and the authors of the present Convention therefore considered it unnecessary to insert a clause confirming this custom.

J. PICTET, COMMENTARY, III GENEVA CONVENTION 250 (1960).

³⁹*See* HORACE READ ET AL., MATERIALS ON LEGISLATION 906-07 (3d ed. 1973).

⁴⁰*See* MYERS McDUGAL ET AL., INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER 156-71 (1967). The authors trace the effectiveness principle back to Grotius, Vattel, and Pufendorf, with all of whom Jefferson was familiar. *Compare id.* at 158 with *supra* text accompanying notes 16, 17.

⁴¹Letter to Patrick Henry, Mar. 27, 1779, 2 PAPERS OF THOMAS JEFFERSON, *supra* note 21, at 237.

as the acts of the Commonwealth, estimate that honour too highly to make its infraction their own act.⁴²

Both Jefferson and Henry knew that the public honor of the United States already had been called into serious question by the Congress's refusal to repatriate the army, as the Convention of Saratoga required. In urging Governor Henry to follow his own conscience, Jefferson was arguing that Virginia should distance itself as much as possible from the Congress's earlier breach of public faith. Henry could do this by implementing the Convention as liberally as possible in the prisoners' favor. It was an argument that anticipated the Nuremberg Tribunal's decision in 1946.

[I]ndividuals have international duties which transcend the national obligations of obedience imposed by the individual state. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the state, if the state in authorizing action moves outside its competence in international law.⁴³

This argument also represented a precursor to Jefferson's position respecting the Constitution of 1787, which he believed gave the states the power to nullify unconstitutional actions by the federal government.⁴⁴

⁴²*Id.* at 238.

⁴³The Nuremberg Judgment (International Military Tribunal, Occupied Germany, 1946), in 2 *THE LAW OF WAR: A DOCUMENTARY HISTORY* 922, 940 (L. Friedman ed., 1972); see also International Law Commission's Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal (1950), in *THE WORK OF THE INTERNATIONAL LAW COMMISSION* 116 (3d ed. 1980).

⁴⁴See Draft of the Kentucky Resolutions, Oct. 1798, in THOMAS JEFFERSON, WRITINGS, *supra* note 4, at 449. Under the Articles of Confederation, the colonies were bound to "abide by the determinations of the united states in congress assembled, on all questions" submitted to the Congress by that document. ARTS. OF CONFED. art. XIII, in DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES 27, 35 (C. Tansill ed., 1927). Article IX gave Congress the exclusive power of "determining on peace and war," making treaties, and appointing general officers. *Id.* at 31, 33. The Articles of Confederation, however, contained no specific grant of authority over prisoners of war—or even over the waging of war. Nevertheless, as an ambassador to Europe in 1785, Jefferson took an expansive view of the treaty power under the Articles of Confederation. Jefferson asserted,

Congress, by the Confederation have no original and inherent power over the commerce of the states. But by the 9th article they are authorized to enter into treaties of commerce. The moment these treaties are concluded, the jurisdiction of Congress over the commerce of the states springs into existence, and that of the particular states is superseded so far as the articles of the treaty may have taken up the subject. ... Congress may by treaty establish any system of commerce they please.

Letter to James Monroe, June 17, 1785, in THOMAS JEFFERSON, WRITINGS, *supra*

Even if all of Jefferson's ingenious arguments concerning the terms of the Convention of Saratoga were accepted, his interpretation still would have protected the Convention Army only from being split apart. The Convention gave no guarantee that the prisoners would not be moved again as a body. Jefferson, therefore, turned next to the reasons against subjecting the Convention Army to another forced march. He founded these reasons on the economic benefits that the Army had brought to the Commonwealth of Virginia, and to Albemarle County in particular. "I expect that our circulating money is increased by the presence of these troops at the rate of 30,000 dollars a week at the least."⁴⁵ He scoffed at those who believed the Convention Army could not be fed in Albemarle County. Virginia, he pointed out, had become the "grain colony," exporting food to the West Indies and the rest of the United States. Any difficulties experienced were caused by the ineptness and dishonesty of the local commissary officers.⁴⁶

Lastly, beyond the text of the Convention and considerations of immediate interest, Jefferson emphasized that reason, morality, and the recent practice of nations, mandated the humane treatment of all prisoners of war.

Their health is also of importance. I would not endeavor to shew that their lives are valuable to us, because it would suppose a possibility that humanity was kicked out of doors in America and interest only attended to.⁴⁷

But is an enemy so execrable that tho in captivity his wishes and comforts are to be disregarded and even crossed? I think not. It is for the benefit of mankind to mitigate the horrors of war as much as possible. The practice therefore of modern nations of treating captive

note 4, at 802, 805-06. By analogy, an interpretation of the surrender convention by the Congress should have superseded any contrary interpretation by the State of Virginia. In 1779, however, Jefferson was writing as an advocate on behalf of prisoners—whom he believed already had suffered enough hardships in captivity—rather than offering an objective assessment of the Congress's powers in relation to the states. In addition, the Articles of Confederation did not enter into force until 1781. Accordingly, even if regulation of the Convention Army was considered to be within the powers granted to the Congress by Article IX, Jefferson technically was not thereby urging Governor Henry to violate the Articles by defying Congress.

⁴⁵Letter to Patrick Henry, Mar. 27, 1779, 2 PAPERS OF THOMAS JEFFERSON, *supra* note 21, at 237.

⁴⁶*Id.* at 239-41.

⁴⁷*Id.* at 241.

enemies with politeness and generosity is not only delightful in contemplation but really interesting to all the world, friends[,] foes and neutrals.⁴⁸

Moreover, Jefferson appealed to the national interest. Specifically, he argued that the views of neutral powers were important because "all the world" would be "ultimate judges" whenever the law of nations is in dispute. If Governor Henry and the Executive Council were not careful, they would compromise the international reputation of their newly independent nation.

Again view this matter as it may regard appearances. A body of troops after staying a twelvemonth at Boston are ordered to take a march of 700 miles to Virginia where it is said they may be plentifully subsisted. As soon as they are there they are ordered on some other march because in Virginia it is said they cannot be subsisted.

Indifferent nations will charge this either to ignorance or to whim and caprice; the parties interested to cruelty.⁴⁹

....

To conclude. The separation of these troops would be a breach of public faith, and therefore I suppose it impossible. If they are removed to another state, it is the fault of the commissaries; if they are removed to any other part of the state, it is the fault of the commissaries; and in both cases the public interest and public security suffer, ... the health of the troops neglected, their wishes crossed and their comforts torn from them, the character of whim and caprice or, what is worse, of cruelty fixed on us as a nation, and to crown the whole our own people disgusted with such a proceeding.⁵⁰

Despite his apprehensions, Jefferson's persuasive efforts actually were not needed. The Convention Army was in no immediate danger of being moved again. His letter to Governor Henry, therefore, is mainly of interest as evidence of Jefferson's reflective thinking on the laws of war. When he wrote it, he could not know that he would soon have immediate personal responsibility for implementing the Convention of Saratoga.

⁴⁸*Id.* at 242.

⁴⁹*Id.* at 243.

⁵⁰*Id.* at 244.

VI. Governor Jefferson and the Convention Army

In June 1779, Thomas Jefferson succeeded Patrick Henry as the second governor of an independent Virginia. As his state's highest public official, he no longer would be able to give full play to the humane idealism he had expressed while serving as an informal advocate for the Convention Army. His duty now required him to interpret and apply the Convention in ways that would not harm America's military effort.

Shortly after Jefferson took office, Major General Phillips, the commanding officer of the Convention Army, placed his troops under Jefferson's "protection," and asked that he be notified as soon as possible of any plans to move them again. Governor Jefferson surely was glad to be able to assure General Phillips that he foresaw "(no probability)" of the Convention Army being moved again. He promised Phillips "the earliest intelligence which I may be permitted to give" if the situation changed.⁵¹

Throughout his administration, Jefferson—going far beyond the duties of his office—continued to demonstrate a personal interest in the health and treatment of the Convention Army. At the beginning of his second term, for example, he sent a lengthy—and rather fussy—letter to Colonel Wood, who commanded the American guards at Charlottesville. The letter advised Wood on the Governor's policy regarding the prisoners being held in close confinement for disciplinary reasons.

Confinement should not be carried so far as to produce mortal effects. I know no objection to letting such of them go at large within proper bounds, whose health really requires it. And if these behave well why not extend the indulgence to all others whose term of confinement has been already such as to amount to a sufficient punishment of their offense.⁵²

These opportunities to relieve suffering must have provided the few satisfactions Jefferson derived from his office. As a private citizen, Jefferson had brushed aside the matter of finding sufficient provisions for the Convention Army, blaming any difficulties on the inefficiency of the commissary officers. As governor, he found this to be a chronic problem that continued to grow worse as the military situation in Virginia deteriorated.⁵³

⁵¹Letter to William Phillips, June 25, 1779, in 3 PAPERS OF THOMAS JEFFERSON, *supra* note 21, at 14.

⁵²Letter to James Wood, June 12, 1780, in *id.* at 436. About 60 to 70 British prisoners suffered close confinement for attempting to escape. Apparently, the Germans were more satisfied with their lots and made no escape attempts. See LEWIS & MEWHA, *supra* note 25, at 11-12.

⁵³See, e.g., Letter to George Washington, Aug. 1780, in 3 PAPERS OF THOMAS JEFFERSON, *supra* note 21, at 581; Letter to James Wood, June 12, 1780, in *id.* at 436.

In Governor Jefferson's first months in office, Virginia already faced threats that it had never known during Patrick Henry's administration. From 1776 to 1779, Virginia had remained largely untouched by enemy operations, except Indian raids on its western frontier. During that same period, the state became a granary, magazine, and arsenal for American armies fighting to the north and south. Thomas Jefferson encountered the misfortune that British officials decided to do something about Virginia's supporting role in the Revolution just as he became governor of the Commonwealth. In 1779, English and Loyalist forces began a series of increasingly destructive raids along the coasts and up the rivers of Virginia, culminating in a full-scale invasion under Lord Cornwallis.

As these incursions grew in size and penetrated ever more deeply into the Virginia countryside, concerns grew that the British would rescue the Convention Army. These concerns eventually presented Jefferson with a major dilemma. By 1780, many of the Convention Army's soldiers had found employment on farms near Charlottesville. The officers, having given their word of honor—or parole—not to escape, had been permitted to reside in rented quarters in the town and at nearby plantations.⁵⁴ Fearing that this situation would aid escape and rescue, the Virginia Assembly ordered that the Convention Army—both its officers and men—be recalled and confined to barracks.

Jefferson realized that carrying out this legislative mandate literally might require the confinement of some of the troops at a distance from their superior officers—the precise breach of public faith that citizen Jefferson had told Governor Henry he should regard as impossible. Governor Jefferson, therefore, faced a possible conflict not only between public faith and military necessity, but also between the sanctity of an international agreement and the Constitution of Virginia.⁵⁵ When faced with these dilemmas, Jefferson, like any practical statesman, tried to postpone conflict between his duties as long as possible. If conflict could not be avoided, however, he ultimately would come down on the side of military necessity and the domestic laws of Virginia. Accordingly, on June 9, 1780, he authorized Colonel Wood to segregate the officers, but only as a last resort.

Conceding to these priorities, Jefferson wrote to Colonel Wood, "Should emergencies render it absolutely necessary, and you think such a means would contribute to safety, the officers

⁵⁴See LEWIS & MEWHA, *supra* note 25, at 11-12; MALONE, *supra* note 12, at 294-96.

⁵⁵See Notes on Virginia, in THOMAS JEFFERSON, *WRITINGS*, *supra* note 4, at 243-45.

must be separated from their men, tho' this should be done only in case of dangers approaching near."⁵⁶ Fortunately, Colonel Wood objected to the entire proceeding, pointing out that confining the British officers would free them from their paroles, allowing them to organize and encourage escapes by the enlisted men.⁵⁷ Jefferson—probably with some relief—presented Wood's letter to the legislature, which responded immediately by reversing its earlier decision.⁵⁸

The threatened arrival of a major British force under Lord Cornwallis finally forced the American authorities to remove the Convention Army to Maryland.⁵⁹ In this crisis, Jefferson placed the highest priority on moving the prisoners out of his state as soon as possible. His orders to Colonel Wood on October 26, 1780, took a very relaxed view of any temporary separation of the officers that might become necessary. Jefferson acknowledged, "It will possibly happen that the Officers cannot be so soon ready [to march] as the Men: In which case we would wish the Men not to be delayed a Moment, but that the Officers should be allowed what time you think reasonable for following you."⁶⁰

Jefferson, who apparently dictated these orders to Wood in haste, may not have seen how this sentence could be interpreted as encouraging a violation of the seventh article of the Convention of Saratoga. Instead, he probably intended it as a humane measure to allow the officers time to terminate their leases, pay their debts, and otherwise settle their affairs. Only a few weeks later, he gave Colonel Wood explicit orders to prevent personal property owned by the prisoners from being summarily seized by local creditors.

No Citizen is at liberty to take forcibly from the Officers . . . their effects in satisfaction for debts. These persons, tho prisoners, are under the protection of the laws and those who injure either their person or property are liable to indictment, and to have such property rescued wherever found.⁶¹

⁵⁶Letter to James Wood, June 9, 1780, *in* 3 PAPERS OF THOMAS JEFFERSON, *supra* note 21, at 428.

⁵⁷See Letter from James Wood, June 15, 1780, *in id.* at 449.

⁵⁸See Letter to James Wood, June 16, 1780, *in id.* at 453.

⁵⁹See Letter to Thomas Sim Lee, Governor of Maryland, Oct. 26, 1780, *in* 4 *id.* at 70.

⁶⁰Letter to James Wood, Oct. 26, 1780, *in id.* at 72, 74.

⁶¹Letter to James Wood, Nov. 7, 1780, *in id.* at 100, 101. To ensure payment of just debts before the troops moved, Jefferson suggested that Colonel Wood and the British commander appoint an arbitral panel to "liquidate all debts due to or from the Conventioners." *Id.* Arbitration was a common method of handling

If Jefferson temporarily had overlooked the terms of the Convention of Saratoga, his mind soon returned to them. Experience had shown that the British prisoners, who had a patriotic stake in the outcome of the war, were more likely to attempt escape than the German mercenaries. Jefferson and the Executive Council, therefore, decided that the British prisoners should be moved away from the advancing enemy first, with the Germans to follow later when adequate quarters had been found. In Jefferson's mind, this raised the old issue of separating the officers from the men. In this case, however, because the officers would not be separated from troops of their own nationality, he quickly disposed of this concern in his orders to Colonel Wood.

I suppose that ... marching them in two divisions, to wit, the British first and Germans next cannot be considered as such a separation as is provided against in the Convention and that [they] themselves would chuse [sic] that the German Division should not go on till barracks are provided, as their going would of course so much the more streighten [sic] the British accommodations.⁶²

Any lingering anxiety Jefferson may have felt about this procedure soon was relieved. As he had anticipated, General Hamilton, the ranking British prisoner, expressly agreed to separate movement of the two nationalities.⁶³

Before the Convention Army left his state, Jefferson faced a few final problems in applying the Convention of Saratoga. The sixth article of the Convention provided that all officers were "to retain their Carriages, ... Horses and other Cattle"⁶⁴ In the eighteenth century, however, horses were important military commodities. At one point in the war, the Virginia Assembly had passed resolutions to prevent prisoners from taking horses out of Virginia. Again, doing his best to avoid any conflict between the Convention and the will of the legislature, Jefferson decided that this resolution—having been passed when an exchange of prisoners was thought imminent—was intended to apply only if the horses were being returned with their owners to the British

disputes in colonial Virginia. *See* DEWEY, *supra* note 12, at 23-25. The civil status of prisoners of war under the laws and before the courts of the detaining power continues to be a controversial subject in modern international law. *See* LEVIE, *supra* note 33, at 180-87.

⁶²Letter to James Wood, Nov. 3, 1780, in 4 PAPERS OF THOMAS JEFFERSON, *supra* note 21, at 95.

⁶³Letter to James Wood, Nov. 7, 1780, in *id.* at 100. Hamilton succeeded Phillips as the senior officer of the Convention Army after the latter's release on parole.

⁶⁴Saratoga Convention, art. 6, in HOWSON, *supra* note 30, at 296.

lines, where they soon could be used in the war against the Americans. Because the Convention Army merely was being moved to Maryland and would remain in American control, Jefferson reasoned that the Assembly's resolution did not apply.⁶⁵

Nevertheless, many of the Convention Army officers had purchased new horses, including "some of the finest" in Virginia, during their long captivity.⁶⁶ Reflecting perhaps on both the military need to keep control of good horseflesh, and on the implications of the phrase "to retain," Jefferson concluded that the Convention allowed the officers to take only the horses that they possessed at the time of surrender back to their own lines; they would not be permitted to retain those they had purchased after capture. By this interpretation, he reconciled the literal terms of the Convention, the needs of military necessity, and the will of the legislature. In case the Convention Army was exchanged after it left Virginia, he advised General Washington of these conclusions.⁶⁷

VII. Governor Jefferson and the Tribunal of Conscience

By scrupulously adhering to the Convention of Saratoga in his dealings with the Convention Army, Jefferson hoped to restore America's international reputation for dealing in good faith. He also hoped to set an example of humanity and restraint that the British government would follow in its treatment of American prisoners and noncombatants. As governor, Jefferson himself practiced such restraint in response to alleged enemy atrocities, emphasizing the need to sift out the facts before acting. Ten years after the Revolution, he would advise President Washington that

[N]ations are to be judges for themselves, since no one nation has the right to sit in judgment over another. But the tribunal of our consciences remains, & that also of the opinion of the world. These will revise the sentence we pass in our own case, & as we respect these, we must see that in judging ourselves we have honestly done the part of impartial & vigorous judges.⁶⁸

Governor Jefferson assumed this quasi-judicial posture when the Continental Congress requested information on atrocities

⁶⁵Letter to James Wood, Nov. 7, 1780, in 4 PAPERS OF THOMAS JEFFERSON, *supra* note 21, at 100, 101.

⁶⁶Letter to George Washington, Nov. 26, 1780, in *id.* at 160.

⁶⁷*Id.*

⁶⁸Opinion on the French Treaties, Apr. 28, 1793, in THOMAS JEFFERSON, WRITINGS, *supra* note 4, at 422, 424.

allegedly committed during Admiral Collier's raid on Portsmouth. Patrick Henry, Jefferson's immediate predecessor as governor, already had issued a proclamation asserting that Collier's men were guilty of "horrid ravages and depredations, such as plundering and burning houses, killing and carrying away stock of all sorts, and exercising other abominable cruelties and barbarities."⁶⁹ Jefferson, however, took a more skeptical view of the evidence, and so informed a member of Virginia's congressional delegation.

Some resolutions of Congress came to hand yesterday, desiring an authentic state to be sent them of the cruelties said to have been committed by the enemy during their late invasion. The [Virginia Executive] council had already taken measures to obtain such a state. Tho so near the scene where these barbarities are said to have been committed, I am not able yet to decide within myself whether there were such or not. The testimony on both sides is such as if heard separately could not admit a moment's suspension of our faith.⁷⁰

Jefferson's pursuit of reason and balance occasionally produced an almost obsessive effort to ensure that even the enemy was treated fairly. Accordingly, in reporting to General Washington on the aftermath of a British raid in the fall of 1780, he declared,

I must do their General and Commodore the justice to say that in every case to which their influence or attention could reach as far as I have been well informed, their conduct was such as does them the greatest honor. In the few instances of unnecessary and wanton devastation, which took place, they punished the aggressors.⁷¹

Even years later, when asked for an account of damage done to his own property, he was careful to distinguish between the

⁶⁹Proclamation by His Excellency Patrick Henry, Governor or Chief Magistrate of the Commonwealth of Virginia, May 14, 1779, *in* 1 OFFICIAL LETTERS OF THE GOVERNORS OF THE STATE OF VIRGINIA 370 (H. McIlwaine ed., 1926) [hereinafter OFFICIAL LETTERS].

"Letter to William Fleming, June 8, 1779, *in* 2 PAPERS OF THOMAS JEFFERSON, *supra* note 21. In the end, Jefferson expressed no official opinion on the Portsmouth incident, and merely forwarded to the Congress the depositions taken from witnesses. See Letter to Samuel Huntington (President of the Congress), Oct. 24, 1779, *in* 3 PAPERS OF THOMAS JEFFERSON, *supra* note 21, at 113.

⁷¹Letter to George Washington, Nov. 26, 1780, *in* 4 PAPERS OF THOMAS JEFFERSON, *supra* note 21, at 160-61.

commendable behavior of Lieutenant Colonel Tarleton, who raided Monticello, and the looting and destruction at Elk Hill by troops under Lord Cornwallis.⁷²

Governor Jefferson's personal inclinations toward reason, caution, and fair dealing probably were reinforced by what had happened at Norfolk, Virginia, earlier in the war. In January, 1775, Norfolk had been looted and burned following a Royal Navy bombardment. The destruction of this port widely was believed to be a prime example of British cruelty, and news of the incident helped solidify the growing sentiment for independence throughout America. Actually, following the initial naval bombardment—which was intended to disrupt a parade of Virginia militia—most of the looting, burning, and general destruction had been carried out by members of the Virginia militia. The militia officers believed the town to be indefensible and ordered it destroyed to keep British forces from using it as a base. By 1777, the state government knew the truth, and the legislature provided for compensation of the victims.⁷³

The caution that marked Jefferson's approach to tales of British atrocities may be contrasted with the attitude of another prominent American of the Enlightenment—Benjamin Franklin—who then served as a diplomat in France. As a former journalist, Franklin appreciated the value of a good atrocity story, true or not, and made ample use of such allegations in his propaganda for the American cause. In 1779, he began planning the publication of a book to be illustrated by woodcuts of British atrocities, including the burning of Norfolk, with "ships firing" and the "inhabitants flying, carrying off the sick and aged." The book also was to depict an unlikely scene of King George III personally receiving an accounting of scalps, presumably taken in his name by Indian allies of the Crown.⁷⁴

Franklin's masterpiece was a false supplement to the *Boston Independent Chronicle*, dated March 12, 1782, purporting to be a republication of a captured British report. The report supposedly accompanied eight bales of American scalps, presented by the Seneca Indians to the Royal Governor of Canada. The false issue of the *Chronicle* was printed—complete with fake advertisements

⁷²See Letter to William Gordon, July 16, 1788, *in* 13 *id.* at 362.

⁷³See JOHN SELBY, *THE REVOLUTION IN VIRGINIA 1775-1783* 81-84 (1988).

⁷⁴See RONALD CLARK, *BENJAMIN FRANKLIN* 366 (1983); *cf.* Catalogue List of British Cruelties: Ideas for Prints (n.d., unpub.), *in* 12 *WORKS OF BENJAMIN FRANKLIN* 61-64 (J. Bigelow ed., 1904).

to make it appear more authentic—at Franklin's own press in Passy, France.⁷⁵

VIII. Governor Jefferson and the Practice of Retaliation: The Case of Colonel Hamilton

As governor, Jefferson did not always hold back from retaliation. Franklin's exaggerations notwithstanding, the suffering imposed on the Virginia frontier by British policy nevertheless was very real. Beginning in the summer of 1776, British authorities in Detroit encouraged the King's Indian allies to attack settlements of white rebels.⁷⁶ Frontier warfare invariably degenerated into a pattern of reciprocal atrocity, involving "an undistinguished destruction of all ages, sexes and conditions."⁷⁷

In one of his earliest actions as governor, Jefferson decided to stop the British authorities from encouraging these attacks by establishing a policy of limited retaliation. Unfortunately, the results achieved by this policy were inconclusive.

On February 24, 1779, Colonel George Rogers Clarke of the Virginia militia captured the Lieutenant Governor of Canada, Lieutenant Colonel Henry Hamilton. Hamilton was taken, along with twenty-six other prisoners, to the Virginia capital at Williamsburg. Widely regarded by American frontiersmen as responsible for Indian attacks on their families, several efforts to lynch Hamilton on the way to Williamsburg were defeated by his guards. Hamilton and his officers arrived at the Virginia capital shortly after Jefferson took office.⁷⁸

As Jefferson had noted in his draft resolution on Ethan Allen, a policy of retaliation usually required that the innocent suffer for the crimes of others. In the person of Colonel Hamilton, however, Jefferson appeared to have found a perfect object of retaliation, one whose personal guilt—in our century he certainly

⁷⁵See CLARK, *supra* note 74, at 366-67; Supplement to the Boston Independent Chronicle, No. 705, *in* BENJAMIN FRANKLIN, WRITINGS, *supra* note 22, at 956. The British "report," supposedly captured along with the scalps by Captain Garrish of the New England Militia, describes in detail the number of scalps of soldiers, farmers, women, children, infants, and the aged. It also "translates" ideograms on them to show what weapons were used to kill each victim, how many were taken from farmers peacefully working in the field, and how many victims were first tortured.

⁷⁶See SELBY, *supra* note 73, at 184-89.

⁷⁷The Declaration of Independence, *in* THOMAS JEFFERSON, WRITINGS, *supra* note 4, at 21-22.

⁷⁸See SELBY, *supra* note 73, at 195-97.

would have been classified as a war criminal—justified harsh treatment by his enemies.⁷⁹

General Phillips, then the ranking British officer with the Convention Army, soon expressed concern over Hamilton's treatment. On June 8, Jefferson assured Phillips that the accusations against Hamilton and his colleagues would be the subject of an impartial inquiry by the Executive Council of Virginia.⁸⁰ A little over a week later, the Council, after hearing evidence, ordered Hamilton to be placed in irons and confined like a criminal in the public jail.⁸¹ In effect, he was to be denied the honorable treatment ordinarily accorded to prisoners of war.

The Executive Council's order, drafted by Jefferson, gave two grounds for this decision—one specifically related to the conduct of Hamilton and his men, and the other to general British practices in the war. First, the Council found "beyond doubt" that Hamilton had encouraged Indians to attack civilians "without distinction of age, sex or condition," and had been "cruel and inhumane" in his own treatment of captives and prisoners of war.⁸² Second, the Council noted that after four years of war, the "conduct of ... British officers, civil and military, has in its general tenor, through the whole course of this war, been savage and unprecedented among civilized nations."⁸³ By contrast, Americans allegedly had treated their prisoners with "moderation and humanity," and so far had not resorted to retaliation. Now, Virginia was "happily possessed, by the fortune of war" with "some of the very individuals, who having distinguished themselves personally in this line of cruel conduct, are fit subjects ...

⁷⁹Cf. 2 G. SCHWARZENBURGER, *INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS* 453 (1968) (jurisdiction over war criminals may be viewed as "an individualized form of reprisals").

⁸⁰See Letter to Theodorick Bland, June 8, 1779, *in* 2 PAPERS OF THOMAS JEFFERSON, *supra* note 21, at 286; 2 OFFICIAL LETTERS, *supra* note 69, at 5.

⁸¹See Order of Virginia Council Placing Henry Hamilton and Others in Irons, June 16, 1779, *in* 2 PAPERS OF THOMAS JEFFERSON, *supra* note 21, at 292; 2 OFFICIAL LETTERS, *supra* note 69, at 9.

⁸²Order of Virginia Council Placing Henry Hamilton and Others in Irons, June 16, 1779, *in* 2 PAPERS OF THOMAS JEFFERSON, *supra* note 21, at 292. According to the editor of Jefferson's papers, both Jefferson and the Virginia Council placed too much reliance on the unreliable evidence of John Dodge in assessing Hamilton's personal guilt. See Note, *id.* at 287. Jefferson and the Council later found cause to have Dodge investigated for misconduct in other circumstances. See Letter from Governor Jefferson to George Rogers Clarke, Jan. 20, 1781, *in* 2 OFFICIAL LETTERS, *supra* note 69, at 295; Letter from Governor Jefferson to George Rogers Clarke, Feb. 19, 1781, *in* 2 *id.* at 363.

⁸³See Order of Virginia Council Placing Henry Hamilton and Others in Irons, June 16, 1779, *in* 2 PAPERS OF THOMAS JEFFERSON, *supra* note 21, at 292; 2 OFFICIAL LETTERS, *supra* note 69, at 9.

to begin the work of retaliation."⁸⁴ Both the Continental Congress and General Washington approved this decision.⁸⁵

General Phillips, however, was not satisfied with the Americans' decision on the matter, and he decided to attack the decision from an unexpected direction. Phillips had known Jefferson as a defender of his own troops' rights under the Convention of Saratoga, and this may have influenced him to make a similar appeal for Colonel Hamilton. On July 5, 1779, he wrote to Jefferson directly, arguing that Hamilton could be placed in irons and close confinement only if he had surrendered unconditionally or as a "prisoner at discretion." Because Colonel Clarke and he had agreed to a surrender under terms—that is, "capitulations"—he was entitled to treatment as a "prisoner of war," and therefore should be offered liberty on parole.⁸⁶

Jefferson responded confidently and at length. He began by expanding on the Council's justifications, specifically citing the "the general principle of National retaliation," and noting that "Governor Hamilton's conduct has been such as to call for exemplary punishment on him personally."⁸⁷ Jefferson pointed out that America had attempted to adhere to a policy of humanity and restraint in dealing with its war prisoners but, in his view, this attempt had failed. "When a uniform exercise of kindness to prisoners on our part has been returned by as uniform severity on the part of our enemies, ... it is high time, by other lessons, to teach respect for the dictates of humanity; in such a case retaliation becomes an act of benevolence."⁸⁸

Furthermore, in his assertion that Hamilton must be held personally liable for acts of his Indian allies, Jefferson raised an issue that the twentieth century would know as command responsibility for war crimes.⁸⁹

Those who act together in war are answerable for each other. No distinction can be made between principal and ally, by those against whom the war is

⁸⁴See Order of Virginia Council Placing Henry Hamilton and Others in Irons, June 16, 1779, in 2 PAPERS OF THOMAS JEFFERSON, *supra* note 21, at 292; 2 OFFICIAL LETTERS, *supra* note 69, at 9.

⁸⁵See Letter from Washington to Jefferson, July 10, 1779, in 3 PAPERS OF THOMAS JEFFERSON, *supra* note 21, at 30; Letter from Cyrus Griffin to Jefferson, July 13, 1779, in *id.* at 34.

"Letter from William Phillips, July 5, 1779, in *id.* at 25.

⁸⁷Letter to William Phillips, July 22, 1779, in *id.* at 44, 45-46.

⁸⁸*Id.*

⁸⁹See, e.g., RICHARD LAEL, THE YAMASHITA PRECEDENT: WAR CRIMES AND COMMAND RESPONSIBILITY (1982); W. Hays Parks, *Command Responsibility for War Crimes*, 62 MIL. L. REV. 1 (1973); Jordan Paust, *My Lai and Vietnam: Norms, Myths and Leader Responsibility*, 57 MIL. L. REV. 99 (1972).

waged. He who employs another to do a deed, makes the Deed his own. If he calls in the assassin, or murderer, [he] himself becomes the assassin or murderer. . . . Governor Hamilton then is himself the butcher of Men, Women and Children. I will not say to what length the fair rules of war would extend the right of punishment against him; but I am sure that confinement, under . . . strictest circumstances, as a retaliation for Indian devastation and massacre, must be deemed [leniency]."⁹⁰

Finally, Jefferson noted that the law of nations did not prohibit the close confinement of a prisoner of war, or require that he be offered parole, unless the terms of surrender specifically guaranteed those rights. The terms of surrender between Colonel Clarke and Governor Hamilton said nothing about the treatment in captivity of the defeated force.⁹¹

Phillips's arguments nevertheless must have planted some doubts in Jefferson's mind because Jefferson referred them to General Washington. As commander in chief, Washington was the ultimate American authority on all military questions, including the customs and usages of war. While the standard references on the law of nations seemed to support Jefferson's position rather than Phillips's, Jefferson himself acknowledged that usages might exist that were "not taken notice of by these writers."⁹² "If you shall be of the opinion that the bare existence of a Capitulation in the case of Governor Hamilton privileges him from confinement, tho' there be no article to that effect in the capitulation, justice shall most assuredly be done him."⁹³

With some embarrassment, Washington replied that, while at first he "had no doubt of the propriety" of Jefferson's treatment of Hamilton, "on more mature consideration," the case now appeared to involve "greater difficulty" than he had realized.⁹⁴ Without directly contradicting Jefferson's position on the law of

⁹⁰Letter to William Phillips, July 22, 1779, *in* 3 PAPERS OF THOMAS JEFFERSON, *supra* note 21, at 44, 46. In the twentieth century, international law permits—after a trial meeting international standards of fairness—the punishment of an enemy prisoner of war for "war crimes" against civilians committed before his or her capture. *See, e.g., In re Yamashita*, 327 U.S. 1 (1946); R. HINGORANI, PRISONERS OF WAR 96 (2d ed. 1982); J. STONE, LEGAL CONTROLS OF INTERNATIONAL CONFLICT 660, n.30 (1954). *But cf. PICTET, supra* note 38, at 421-22 (suggesting fairness requires postponement of trial until after the end of hostilities).

⁹¹*See* Letter to William Phillips, July 22, 1779, *in* 3 PAPERS OF THOMAS JEFFERSON, *supra* note 21, at 44, 48.

⁹²Letter to George Washington, July 17, 1779, *in id.* at 40, 41.

⁹³*Id.*

⁹⁴Letter from George Washington, Aug. 6, 1779, *in id.* at 61.

nations, Washington explained that he had consulted his generals, and "it seems to be their opinion" that, because Hamilton had surrendered under a capitulation, he should not—according to the usages of war—be subjected to "any uncommon severity" as an act of retaliation.⁹⁵ On the other hand, Hamilton's behavior merited some "discrimination" in treatment. He "could not claim of right upon any ground, the extensive indulgence" of being granted the parole that General Phillips sought for him.

The Virginia government acted quickly to comply with Washington's advice. Nevertheless, Jefferson later grumbled that he still could not "in the nature of the thing see any difference between a prisoner at discretion and a prisoner on capitulation, other than arises from the express stipulations in the articles."⁹⁶ Actually, the views of Washington and his officers probably were based not as much on a superior knowledge of the usages of war as on the practical reality that the British believed strongly that Hamilton was being treated improperly. Washington's military leaders undoubtedly realized that if the enemy decided to retaliate, their brother officers in captivity would feel the effects. To the generals of the Continental Army, the Governor of Virginia must have seemed an irresponsible civilian, meddling in affairs that were none of his business.

The British, of course, did retaliate. In New York City, a Virginia prisoner of war was placed in irons, and all exchanges of officers from Virginia were suspended until Hamilton's fate had been determined. Another Virginia prisoner, Colonel George Mathews, was released on parole to bring word of these measures to Washington and Jefferson.⁹⁷

Fortunately, by the time Colonel Mathews arrived in Richmond, Hamilton had been removed from irons and the Virginia Executive Council already had approved his release on parole within a limited area. The stated reason for this leniency

⁹⁵*Id.* This advice apparently is inconsistent with Washington's own decision, in 1782, to consider British officers who had surrendered at Yorktown as proper objects of retaliation. Loyalist irregulars from New York had hanged Captain Joseph Huddy, an American prisoner of war. In retaliation, Washington ordered a British prisoner of the same rank to selected by lot and hanged. The lot fell on Captain Charles Asgill, who was covered by the terms of the Yorktown surrender. Even more disturbing, the Yorktown capitulation specifically provided that none of its terms were to be "infringed on pretense of reprisal." Articles of Capitulation, art. XIV, *in* H. JOHNSTON, *THE YORKTOWN CAMPAIGN AND THE SURRENDER OF CORNWALLIS* 187, 189 (1881) (1975 reprint). Washington delayed carrying out the threatened retaliation, and Asgill eventually was released at the intervention of the French government. *See* JAMES FLEXNER, *GEORGE WASHINGTON IN THE AMERICAN REVOLUTION* 479-82 (1968).

"Letter to William Phillips, Oct. 2, 1779, *in* 3 PAPERS OF THOMAS JEFFERSON, *supra* note 21, at 97.

⁹⁷*See* Letter to George Washington, Oct 2, 1779, *in id.* at 99.

echoed the language of Jefferson's draft resolution on Ethan Allen. "[N]o impression can be made on the event of the war by ... vengeance on miserable captives." It also expressed a hope that the enemy would improve the treatment of American prisoners, and "spare us the future pain of a second departure from kindness to our captives."⁹⁸

In principle, Jefferson did not forego the threat of retaliation. He sent Colonel Mathews back to New York with a message that if the British continued "declining the tribunal of truth and reason" and instead chose to "pervert this into a contest of cruelty and destruction[,] we will contend with them in that line."⁹⁹

Although the incident appeared to be settled, Governor Jefferson and Lieutenant Governor Hamilton were not done with each other. Released from irons, Hamilton remained understandably suspicious of the Virginians. He refused to sign the parole offered to him because it required him not to "say or do any thing directly or indirectly to the prejudice of the United States of America."¹⁰⁰ This provision, he feared, would be used to brand him a parole violator if he said anything critical of the Americans or their cause.

Jefferson, for his part, refused to exchange Hamilton—a policy that eventually put Jefferson at odds with Washington once again. To centralize negotiations on the exchange of prisoners, the Continental Congress decreed in January 1781 that all prisoners of war should be transferred from state custody to national control.¹⁰¹ Governor Jefferson obediently transferred to the United States Commissary General of Prisoners all of the prisoners of war held by Virginia—except for Hamilton. Washington noted the omission and asked "on what footing to place him" in upcoming exchange negotiations.¹⁰² In reply, Jefferson expressed a determination to retain Hamilton, considering "the influence of this Officer with the Indians, his activity and embittered Zeal against us," and the precarious hold Virginia retained on the West.¹⁰³

Jefferson was being less than frank with Washington. The real reason for refusing to exchange Hamilton was the hope that

⁹⁸ *Advice of Council respecting Henry Hamilton and Others*, Sept. 29, 1779, *in id.* at 94-5.

⁹⁹ *Letter to George Mathews*, Oct. 8, 1779, *in id.* at 101-102.

¹⁰⁰ *See* Form of Parole offered to Henry Hamilton, 1 Oct. 1779, *in id.* at 95; Note, *in id.* at 96; Letter to George Washington, Oct. 1, 1779, *in id.* at 97.

¹⁰¹ *"See LEWIS & MEWHA, supra note 25, at 7-8.*

¹⁰² *Letter from George Washington*, Sept. 5, 1780, *in 3 PAPERS OF THOMAS JEFFERSON, supra note 21, at 605.*

¹⁰³ *Letter to George Washington*, Sept. 26, 1780, *in id.* at 664.

he still could use him as a bargaining chip to obtain better treatment for Virginians held by the British. Barely two weeks after refusing to turn Hamilton over to the Continental authorities, Jefferson approved Hamilton's return, on parole, to British authorities at New York.¹⁰⁴ This step would, in the ordinary course of events, lead to his exchange and return to combat against the Americans. Almost simultaneously, Jefferson received assurances that the "generous" conduct by Virginia towards Hamilton would be reciprocated by the British. In particular, the state would be given permission to send relief supplies through British lines to its prisoners in New York.¹⁰⁵

Some secret negotiation between Jefferson and the British must lie behind the sparse documentation that survives.¹⁰⁶ Still, the general assurances of future good treatment, which Jefferson received in exchange for Hamilton's parole, hardly can be held up as a resounding success for a policy of retaliation as a means of securing better treatment for Virginia prisoners of war or its civilian inhabitants on its frontiers.

IX. Governor Jefferson and the Practice of Retaliation: Benedict Arnold and the Tory Privateers

Governor Jefferson also was unable to find an effective means of protecting the civilian population of the Virginia seaboard. The effects of war along the coastal regions of the state increased tremendously during his administration. To cut off Virginia's supplies to American armies fighting elsewhere, British raiding parties began capturing or destroying any resources of potential military value they could find on the Virginia coast. This method of warfare inevitably had a heavy impact on the civilian population.

¹⁰⁴See Henry Hamilton's Parole, Oct., 10, 1780, *in* 4 *id.* at 24. The parole included the language Hamilton had found objectionable a year earlier, obligating him not to "do, say, write or cause to be done, said or written directly or indirectly ... anything to the Prejudice of the United States of America." The difference, of course, was that this parole allowed him to return to New York, where the final decision on any question of parole violation would lie with his superiors in the British army rather than with the Virginians.

¹⁰⁵See Letter from Oliver Towles, Oct. 12, 1780, *in id.* at 33.

¹⁰⁶Jefferson informed Washington that he had released Hamilton because of "representations received by Colo. Towles" that Hamilton's release would "produce the happiest effect on the situation" of American prisoners on Long Island. Letter to George Washington, Oct. 25, 1780, *in id.* at 68. The letter from Towles is dated two days after Hamilton's parole. Compare Letter from Oliver Towles, Oct. 12, 1780, *in id.* at 33 with Henry Hamilton's Parole, Oct. 10, 1780, *in id.* at 24. This suggests that the letter from Towles merely served to confirm assurances that Jefferson already had received in confidential negotiations.

On May 8, 1779, a British fleet of twenty-eight ships under Admiral Collier arrived off the Virginia coast. Collier landed a force of 1800 men near Portsmouth which, for sixteen days, raided the surrounding countryside. The British troops included Virginia Loyalists who had fled with Lord Dunmore. For them, Collier's expedition provided an opportunity to serve as privateers who would exact revenge on their former countrymen. Collier's men destroyed or captured 137 vessels and burned the town of Suffolk. Thousands of barrels of tobacco, salted food, and naval stores, valued at up to two million pounds, also were destroyed.¹⁰⁷

The raid "sent a paroxysm of fear through Virginia."¹⁰⁸ The Congress, with little thought of the practicalities involved, urged the burning of British cities in retaliation.¹⁰⁹ Tales of looting, mutilation of civilians, and outrages against women were common. Although the authenticities of some of the stories were doubtful, authorities later confirmed that several civilians had been murdered. Admiral Collier blamed the privateers for any outrages that may have been committed, saying they had "no idea of order or discipline."¹¹⁰

A week after Collier sailed away, Jefferson took office as governor. The Loyalist privateers stayed behind, effectively preventing American commerce on Chesapeake Bay. "Our trade has never been so distressed," Jefferson reported to the Continental Congress, "since the time of Lord Dunmore as it is at present by a parcel of trifling privateers under the countenance of two or three larger vessels who keep our little naval force from doing anything."¹¹¹

Regular British forces did not return for over a year. Finally, on October 21, 1780, Major General Leslie landed at Portsmouth, Virginia, between 2200 and 2500 troops. After several weeks of raiding and requisitioning horses and wagons, Leslie departed on November 16.¹¹² The privateers, however, remained behind again. By the following summer, many had degenerated into ordinary pirates, robbing Loyalist and Patriot vessels indiscriminately. Even Lord Cornwallis—by then the ranking British commander in

¹⁰⁷See SELBY, *supra* note 73, at 205-08; MERRILL PETERSON, THOMAS JEFFERSON AND THE AMERICAN REVOLUTION 42-43 (1976).

¹⁰⁸SELBY, *supra* note 73, at 207.

¹⁰⁹See *id.* at 208.

¹¹⁰*Id.* at 206.

¹¹¹Letter to John Jay, June 19, 1779, in 3 PAPERS OF THOMAS JEFFERSON, *supra* note 21, at 4; cf. PETERSON, *supra* note 107, at 47.

¹¹²See SELBY, *supra* note 73, at 216, 221; PETERSON, *supra* note 107, at 48.

Virginia—complained that their actions were prejudicial to the royal cause.¹¹³

A more destructive raid began on December 20, 1780, when 1800 men under the command of Benedict Arnold, now in the King's service, advanced along the James River to Richmond, the new capital of Virginia.¹¹⁴ Richmond was occupied on January 5, 1781, but Arnold offered to spare the city for a ransom payment. Governor Jefferson refused and, on the next morning, "the enemy, having burnt some houses and stores, left Richmond after 24 hours stay there. . . ."¹¹⁵ "They have done very great injury to some individuals," Jefferson reported, having burned "3 or 4 houses of private **property**."¹¹⁶ Jefferson's administration was discredited by the raid and Virginian morale had been damaged badly, "less from any injury inflicted by the traitor than from the state's helplessness to return the blow."¹¹⁷

Arnold's presence brought another threat—or perhaps a measure of relief—to a portion of Virginia's civilian population. All able-bodied free males between the ages of sixteen and fifty were, ipso facto, members of the Virginia militia.¹¹⁸ Arnold's men, therefore, offered anyone of that description whom they encountered a choice of becoming a prisoner of war or signing a parole not to take up arms against the Crown until exchanged. That the persons concerned never had been called to active duty or trained apparently was considered irrelevant. On January 21, 1781, Jefferson issued a proclamation denouncing the practice of extorting paroles from "peaceful citizens" as "unauthorized by the law of nations and unattempted in any other age or by any other **enemy**."¹¹⁹ Such paroles, he declared, would not be honored by the state. Those signing them nevertheless would be required to fulfill their duties as members of the militia.

This placed the Virginians who had signed these paroles in a difficult position. Traditionally, a prisoner of war who violated parole was subject to severe punishment—even death—if recaptured.¹²⁰ At least one Virginian asserted he had been told by a

¹¹³ See D. SHOMETTE, *PIRATES ON THE CHESAPEAKE* 275 (1985).

¹¹⁴ See SELBY, *supra* note 73, at 221-25; PETERSON, *supra* note 107, at 50-52.

¹¹⁵ "Jefferson's Diary of Arnold's Raid, entries for Jan. 5 & 6, 1781, in 4 PAPERS OF THOMAS JEFFERSON, *supra* note 21, at 259.

¹¹⁶ "Letter to Brigadier General George Weedan, January 10, 1781, in *id.* at 335-36.

¹¹⁷ PETERSON, *supra* note 107, at 52.

¹¹⁸ See Notes on Virginia, Query IX, in THOMAS JEFFERSON, *WRITINGS*, *supra* note 4, at 216.

¹¹⁹ Proclamation concerning Paroles, Jan. 19, 1781, in 4 PAPERS OF THOMAS JEFFERSON, *supra* note 21, at 403; 2 OFFICIAL LETTERS, *supra* note 69, at 288.

¹²⁰ See LEVIE, *supra* note 34, at 402.

British officer that he would be hanged if captured in arms after having given parole.¹²¹ Jefferson's response was that the law of nations authorized only close confinement, not death, for a violation of parole. Accordingly, he threatened retaliation if the British carried out this threat.¹²²

Jefferson cited no authority for his proposition that a parole violation lawfully could not be punished by death, and later authorities would contradict him directly on that point.¹²³ This assertion probably is based on Jefferson's preference for modern, humane practice over older precedents and authorities. Executions for parole violation were probably quite rare in the eighteenth century. The only instance in which the British actually hanged an American prisoner for breach of parole also involved violation of an oath of loyalty to the Crown. The incident became highly controversial on both sides of the Atlantic, and the propriety of the execution was debated in Parliament.¹²⁴

Except for the parole controversy and the constant annoyance of the privateers, Virginia remained quiet until spring of 1781. In early April of that year, however, land forces under General Phillips, supported by a squadron of twelve ships, raided along the Potomac for two weeks, burning houses and stored tobacco. On April 18, this force appeared on the James River, seizing horses and cattle and destroying tobacco and flour.¹²⁵

The main British army in the South, under the command of Lord Cornwallis, arrived in May. Jefferson then personally apprehended the impact of war when a cavalry column under Lieutenant Colonel Tarleton was sent to Charlottesville to capture him. Jefferson spent his final days as governor in flight.

¹²¹ See Letter to Mr. Thomas Fletcher, Mar. 21, 1781, in 2 OFFICIAL LETTERS, *supra* note 69, at 421.

¹²² See Letter to the Commanding Officer of the British force at Portsmouth, Mar. 24, 1781, in *id.* at 430. Jefferson did not want to address Benedict Arnold by name or recognize that Arnold held any legitimate rank in the British Army.

¹²³ See, e.g., LEVIE, *supra* note 34, at 402.

¹²⁴ See DAVID BOWDEN, THE EXECUTION OF ISAAC HAYNE (1971). The British had punished Ethan Allen for parole violation only by returning him to confinement. See GARRETT, *supra* note 20, at 41. Lieutenant Governor Hamilton, in Governor Jefferson's hands as a prisoner of war, only expressed concern about renewed imprisonment and the stigma of violating parole if the Virginians had tricked him into an apparent violation. See Note, 3 PAPERS OF THOMAS JEFFERSON, *supra* note 21, at 96.

¹²⁵ See SELBY, *supra* note 73, at 270-73. After participating in an exchange of prisoners, Phillips—formerly the senior British officer in the Convention Army—had been assigned to replace Benedict Arnold as commander of British forces in southeastern Virginia. One of Phillips's first acts after taking command was to end Arnold's policy of demanding paroles from unarmed civilians. See *id.* at 262.

The British army, however, had not completed its mission against Jefferson. Troops under Lord Cornwallis occupied Jefferson's plantation at Elk Hill, and years later Jefferson remained bitter when describing the behavior of their commander.

He destroyed all my growing crops of corn and tobacco; he burned all my barns containing the same articles of the last year, having first taken what he wanted; he used, as was to be expected, all my stocks of cattle, sheep, and hogs for sustenance of his army, and carried off all the horses capable of service; of those too young for service he cut the throats; and he burned all the fences on the plantation so as to leave it an absolute waste. ... He treated the rest of the neighborhood somewhat in the same style, but not with that spirit of total extermination with which he seemed to rage over my possessions.

Wherever Cornwallis's troops went, the dwelling houses were plundered of everything that could be carried off.¹²⁶

By the end of the Revolution, Jefferson had learned that both appeals to reason and threats of retaliation were less than effective to guarantee the humane treatment of noncombatants. Reason alone did not generate sufficiently precise standards for the treatment of civilians and prisoners. When standards were imprecise, threats of retaliation often produced only counter-threats from the enemy. On the other hand, his experiences with the Convention Army suggested the utility of written standards for the treatment of prisoners, established by agreement between the parties to the conflict. Jefferson would have an unexpected opportunity to apply these lessons when he returned to the Continental Congress in 1783 and 1784.

X. Franklin's Idea

No direct evidence exists to demonstrate that, by 1781, Jefferson had recognized the possible importance of humanitarian provisions in treaties. Another American statesman, however, clearly had reached that conclusion by the end of the Revolution. While Jefferson was serving as Governor of Virginia, Benjamin Franklin was the senior American diplomat in Paris. His responsibilities included seeking aid for American prisoners of

¹²⁶Letter to William Gordon, July 16, 1788, in 3 PAPERS OF THOMAS JEFFERSON, *supra* note 21, at 362, 363-64.

war in England¹²⁷ and ruling on the legitimacy of captures by American privateers in European waters.¹²⁸ Commissioned to prey only on British shipping, and neutral vessels carrying contraband of war, privateer captains nevertheless were tempted to seize almost any neutral vessel sailing to a British port. Frequently, the privateer captain would attempt to capture a neutral vessel with the hope that the action later would be upheld, thereby allowing him to benefit from the value of the seized vessel and its cargo. This practice, however, together with the indiscipline of the privateer crews, involved Franklin in continuing disputes with French admiralty courts. These disputes, according to a recent biographer, forced Franklin to perform "work he thoroughly detested."¹²⁹

By the end of the Revolutionary War, privateers operating out of French ports had captured 114 British merchant vessels and played havoc with England's coastal trade.¹³⁰ Franklin's overall view of commerce raiding, however, became increasingly negative. By June 1780, he was proposing that "unarmed trading ships, as well as fishermen and farmers, should be respected as working for the common good of mankind, and never interrupted in their operations, even by national enemies."¹³¹

In early 1783—at the end of the peace negotiations with Britain—Franklin made a rather desperate effort to include these views in the peace settlement. Writing to Richard Oswald, one of his British counterparts, he enclosed "a proposition for improving the law of nations, by prohibiting the plundering of unarmed and usefully employed people."¹³² The enclosure, entitled "Propositions Relative to Privateering," included the following draft article for the treaty to be concluded between Britain and the United States:

If war should hereafter arise between Great Britain and the United States, which God forbid, ... all

¹²⁷See, e.g., American Commissioners to American Prisoners in England, Sept. 19, 1778, in 27 PAPERS OF BENJAMIN FRANKLIN, *supra* note 26, at 422-23; Complaint from American prisoner of war on conditions of confinement, Aug. 19, 1778, in *id.* at 278; ESMOND WRIGHT, FRANKLIN OF PHILADELPHIA 281-82 (1986).

¹²⁸WRIGHT, *supra* note 127, at 279-80; CLARK, *supra* note 74, at 330-32.

¹²⁹CLARK, *supra* note 74, at 332. In his *Observations on War*, Franklin asserted that sailors and privateers "spend what they get in riot, drunkenness and debauchery, lose their habits of industry, are rarely fit for any sober business after a peace, and serve only to increase the number of highwaymen and house-breakers." 12 WORKS OF BENJAMIN FRANKLIN, *supra* note 74, at 55, 57.

¹³⁰See WRIGHT, *supra* note 127, at 282.

¹³¹Letter to Robert Morris, June 3, 1780, quoted in GERALD STOURZH, BENJAMIN FRANKLIN AND AMERICAN FOREIGN POLICY 229 (1969).

¹³²Letter to Richard Oswald, Jan. 14, 1783, in 10 WORKS OF BENJAMIN FRANKLIN, *supra* note 74, at 68.

fishermen, all cultivators of the earth, and all artisans or manufacturers unarmed, and inhabiting unfortified towns, villages or places, who labor for the common subsistence and benefit of mankind, and peaceably follow their respective employments, shall be allowed to continue the same, and shall not be molested by the armed force of the enemy into whose power by the events of war they may happen to fall; but, if anything is necessary to be taken from them, for the use of such armed force, the same shall be paid for at a reasonable price. And all merchants or traders with their unarmed vessels, employed in commerce, exchanging the products of different places, and thereby rendering the necessities, conveniences, and comforts of human life more easy to obtain and more general, shall be allowed to pass freely, unmolested. And neither of the powers, parties to this treaty, shall grant or issue any commission to any private armed vessels, empowering them to take or destroy such trading ships, or interrupt such commerce.¹³³

Franklin first had proposed the substance of this article in a conversation with Oswald during the summer of 1782—apparently without a response. In November, Franklin again brought up the issue and offered the British diplomat a copy of “Propositions Relative to Privateering.” Oswald, however, refused to accept the paper and offered nothing more than sympathetic and noncommittal comments.¹³⁴

Raising the matter a final time by his January letter, Franklin admitted that he had not shown the draft article to his American colleagues, John Jay and John Adams. Franklin wrote to Oswald that if it “might be acceptable on your side,” he would try to secure American concurrence.¹³⁵ The extraordinary procedure of asking a British delegate to concur in the proposal before showing it to other members of the United States delegation suggests that Franklin knew his colleagues would not take a favorable view of it. He must have known his proposal had little hope of being accepted during this negotiation. “I rather wish

¹³³*Id.* at 72-73.

¹³⁴See STOURZH, *supra* note 131, at 229-31.

¹³⁵Letter to Richard Oswald, Jan. 14, 1783, in 10 WORKS OF BENJAMIN FRANKLIN, *supra* note 74, at 68. The American diplomats in Europe were divided deeply. Commissioners John Adams and John Jay regarded Franklin as too willing to trust the French during the peace negotiations. See C. CURREY, BEN FRANKLIN: PATRIOT OR SPY? 223, 225, 248 (1972); STOURZH, *supra* note 131, at 159, 176-81.

than expect it will be adopted,"¹³⁶ he confided to Oswald, who never replied to Franklin's letter.¹³⁷

XI. Return to the Continental Congress

Franklin's draft article, however, was not as dead as he must have feared. Eleven months later it would reappear in Annapolis, Maryland, in a committee report to the Continental Congress written by Thomas Jefferson.

When Jefferson returned to the Congress in the fall of 1783, he found a smaller and less distinguished body than he had left in 1776. He soon was serving on almost every committee and drafting at least thirty-one state papers in six months.¹³⁸ He received one of his first assignments on December 15, 1783. On that date, correspondence received from the United States ministers in Europe was referred to a committee composed of Jefferson, Hugh Williamson of North Carolina, and Elbridge Gerry of Massachusetts.¹³⁹

Working with unusual efficiency, the committee reported back five days later with detailed instructions for the diplomats. The instructions included nine "points to be carefully stipulated" in future treaties of amity and commerce.¹⁴⁰ The fourth of these items, to be "proposed, though not indispensably required," was Franklin's draft article, copied almost verbatim from his "Propositions Relative to Privateering."¹⁴¹ These instructions were approved by the Congress on May 7, 1784. On the same day, Jefferson was appointed—with John Adams and Benjamin Franklin—as a commissioner to negotiate treaties of amity and commerce with the European powers.¹⁴²

¹³⁶Letter to Richard Oswald, Jan. 14, 1783, *in* 10 WORKS OF BENJAMIN FRANKLIN, *supra* note 74, at 68.

¹³⁷See STOURZH, *supra* note 131, at 231. Franklin made a final, and equally futile, effort to have his idea espoused by the British when Oswald was replaced by David Hartley incident to a change of government in Great Britain. See Letter to David Hartley, May 8, 1783, *in* 10 WORKS OF BENJAMIN FRANKLIN, *supra* note 74, at 113.

¹³⁸See MALONE, *supra* note 12, at 411.

¹³⁹See 25 JOURNALS OF THE CONTINENTAL CONGRESS 813 (G. Hunt ed., 1922).

¹⁴⁰See Report on Letters from the American Ministers in Europe, *in* 6 PAPERS OF THOMAS JEFFERSON, *supra* note 21, at 393-402. Two earlier committees, meeting on October 22 and October 29, 1783, had been able to produce only general and incomplete instructions for the negotiation of treaties of amity and commerce. See 25 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 139, at 720-22.

¹⁴¹Report on Letters from the American Ministers in Europe, *in* 6 PAPERS OF THOMAS JEFFERSON, *supra* note 21, at 394, para. 4.

¹⁴²See MALONE, *supra* note 12, at 419.

How Franklin's text came before Jefferson's committee is not known. Jefferson, however, clearly supported Franklin's proposition. He later defended the humanitarian provisions of the Treaty of Amity and Commerce with Prussia.¹⁴³ Furthermore, in his autobiography, Jefferson expressly associated himself with the adoption of Franklin's proposals. "We inserted [Franklin's] article in our form, with a provision against the molestation of fishermen, husbandmen, [and] citizens unarmed."¹⁴⁴ Hugh Williamson of North Carolina was another probable supporter. He may have been a friend of Franklin, and certainly shared his scientific interests.¹⁴⁵ Finally, the third member of the committee, Elbridge Gerry, probably went along with his two colleagues, but only reluctantly. Gerry not only belonged to a congressional faction hostile to Franklin,¹⁴⁶ but also—as a former privateer—hardly could have shared his colleagues' enthusiasm in support of Franklin's proposal to ban the practice.¹⁴⁷

Jefferson's experiences, on the other hand, gave him reason to share Franklin's distaste for privateers. During his years as governor, Loyalist privateers had been responsible for much of the suffering imposed on Virginia's civilian population. Governor Jefferson had found himself unable to deter the destruction and seizure of civilian property and molestation of unarmed civilians. These were precisely the activities Franklin's text formally would forbid.

¹⁴³ See Letter to Jean Nicolas Demeunier, June 26, 1786, in THOMAS JEFFERSON, WRITINGS, *supra* note 4, at 590-91.

¹⁴⁴ *Autobiography*, in THOMAS JEFFERSON, WRITINGS, *supra* note 4, at 1, 56.

¹⁴⁵ "With Franklin, Williamson established a close friendship [in England], and collaborated with him in numerous experiments in electricity." Williamson, Hugh, in 10 *DICTIONARY OF AMERICAN BIOGRAPHY* 298, 299 (D. Malone ed., 1936). The entry in the *Dictionary of American Biography* reports that after witnessing the Boston Tea Party on December 16, 1773, Williamson "by a bold stratagem" obtained letters of the royalist governor of Massachusetts, Hutchinson, which he passed on to Franklin in England. *Id.* at 299. This account, however, is inconsistent with Wright's assertion that Franklin already had the Hutchinson letters in December 1772. See WRIGHT, *supra* note 127 at 224; CLARK, *supra* note 74, at 225-26. Wright maintains that the Hutchinson letters were passed to Franklin in 1772 by an unknown member of Parliament.

¹⁴⁶ See E. BILLIAS, *ELBRIDGE GERRY* 91 (1976).

¹⁴⁷ Between 1780 and 1783, Gerry "engaged successfully in trade and privateering." Gerry, Elbridge, in 4 *DICTIONARY OF AMERICAN BIOGRAPHY* 222, 223 (A. Johnson & D. Malone eds., 1931-32). On Gerry's motion at the Constitutional Convention of 1787, the Framers included in the Constitution the provision that expressly empowers Congress to "grant Letters of Marque and Reprisal"—that is, to authorize privateering. See U.S.CONST. art. I, § 8; Debates in the Federal Convention of 1787 as Reported by James Madison, Aug. 18, in *DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES*, *supra* note 44, at 109, 564. Franklin also may have profited from selling prizes captured by privateers. See CURREY, *supra* note 135, at 148-49. If true, this did not prevent him from later opposing the practice.

In supporting a written standard of humane treatment, to be included in as many future treaties as possible, Jefferson was relying on more than his own experiences with the Convention Army. For a scholar of the Enlightenment, educated in the rhetorical and literary culture of ancient Greece and Rome, the very act of publicly defining a standard of behavior was an important step toward its general acceptance. To express a moral idea clearly expanded the moral imagination of all who heard or read it. "Jefferson held with Locke, for instance, that language was the vehicle of ideas. But it was a sensual vehicle and its very life was expanding imagination, by the sole means of which reason as well as memory could become articulate and the moral sense could crystallize principles."¹⁴⁸

As President, Jefferson later made an attempt to apply this technique to secure the rights of neutral powers in the Napoleonic Wars. His 1806 letter to Czar Alexander of Russia furnishes important insights into Jefferson's thinking on the moral value of treaties. On that occasion, President Jefferson urged the Czar to "render eminent service to nations in general" at any future European peace conference,

by incorporating into the act of pacification, a correct definition of the rights of neutrals on the high seas. Such a definition, declared by all the powers lately or still belligerent, would give to those rights a precision and notoriety, and cover them with an authority, which would protect them in an important degree against future violation¹⁴⁹

XII. Paris and the Prussian Treaty

The three American commissioners for treaties of amity and commerce held their first official meeting in Paris in August 1784. Jefferson thereafter assumed the task of converting the instructions of Congress into a draft treaty.¹⁵⁰ In this process, the law of

¹⁴⁸ LEHMANN, *supra* note 15, at 143.

¹⁴⁹ Letter to the Emperor Alexander, Apr. 18, 1806, *in* THOMAS JEFFERSON, WRITINGS, *supra* note 4, at 1161-62.

¹⁵⁰ "Mr. Adams soon joined us at Paris, & our first employment was to prepare a general form to be proposed to such nations as were disposed to treat with us." Autobiography, *in* THOMAS JEFFERSON, WRITINGS, *supra* note 4, at 1, 56. Adams, Franklin, and Jefferson held their first official consultation at the Parisian suburb of Passy on August 30, 1784. *See* MALONE, *supra* note 12, at 22. A preliminary outline and the draft treaty appear among Jefferson's papers, written in his own hand. *See* Classification of Treaty Provisions, *in* 6 PAPERS OF THOMAS JEFFERSON, *supra* note 21, at 476-78; Draft of a Model Treaty, *in* *id.* 479-88. The editor of Jefferson's papers concluded, on the basis of extrinsic evidence, that

war provisions were expanded significantly. Under Jefferson's hand, Franklin's proposal to protect "cultivators of the earth," fishermen, and artisans was extended to include "all women and children" and "scholars of every faculty."¹⁵¹ At the same time, the qualifying clause, "peaceably following their respective employments," was deleted out of concern that it would exclude all members of the militia from the protection of the article.¹⁵²

Jefferson also made the scope of civilian protection more specific. Franklin and the Congress had provided that members of the civilian population were not to be "molested by the armed force of the enemy into whose power ... they may happen to fall." In Jefferson's draft, civilians were not to be "molested in their persons nor shall their houses or goods be burnt or otherwise destroyed nor their fields wasted" by those forces.¹⁵³ In one important respect, Jefferson's reformulation was narrower than Franklin's. It did not expressly forbid an enemy from "molesting" cultivators of the earth by promising freedom to their slaves—a measure that the British actively had used in the American South during the Revolution.¹⁵⁴

The most significant addition, however, was an entirely new article—apparently drafted after some discussion among the commissioners—to follow the provision on civilians.¹⁵⁵ The new article addressed the treatment to be given prisoners of war. During the Revolution, American prisoners of war had been held, often in appalling conditions, in prison ships off New York City

Jefferson had a draft model treaty prepared by the middle of September 1784. See Note 30, *in id.* at 490.

¹⁵¹Draft of a Model Treaty, art. 23, *in* 6 PAPERS OF THOMAS JEFFERSON, *supra* note 21, at 486.

¹⁵²See Notes for Consideration of Commissioners, *in id.* at 478, 479. This change undoubtedly reflected Jefferson's dispute with Benedict Arnold over whether an unmobilized member of the militia could be required to give his parole upon capture.

¹⁵³Draft of a Model Treaty, art. 23, *in id.* at 486.

¹⁵⁴On November 21, 1775, Lord Dunmore, the Royal Governor of Virginia, issued a proclamation offering freedom to all slaves of rebel owners able and willing to fight for the Crown. See JOHN SELBY, *DUNMORE* 36-38 (1977). Jefferson lost 90 slaves during a raid by Lord Cornwallis's forces. See MALONE, *supra* note 12, at 390.

¹⁵⁵An article on prisoners of war was interlined on Jefferson's copy of the Classification of Treaty Provisions. See 6 PAPERS OF THOMAS JEFFERSON, *supra* note 21, at 476-78. The complete article was added at the end of the draft treaty. See Draft of a Model Treaty, *in id.* at 479-88. In both cases, young John Quincy Adams had copied the earlier version—presumably for John Adams' use. This suggests that the provision on prisoners of war, draft article 24, was added only after the first version had been discussed among the commissioners.

and at Mill and Forton prisons in England.¹⁵⁶ In addition, as Franklin and Adams were aware, a few political prisoners reportedly had been sent to British colonies in Africa.¹⁵⁷ To prevent repetition of these experiences, the draft provided as follows:

And to prevent the destruction of prisoners of war by sending them into distant and inclement countries, or by crowding them into close and noxious places, the two contracting parties solemnly pledge themselves to each other and to the world that they will not adopt any such practice, that neither will they send the prisoners whom they may take in war from the other into the East Indies or any other parts of Asia or Africa; but that they shall be placed in some part of their dominions in Europe or America, in wholesome situations, that they shall not be confined in dungeons, prison ships, nor prisons, nor be put into irons, nor bound, nor otherwise restrained in the use of their limbs, that the officers shall be enlarged [i.e., released] on their paroles within convenient districts and have comfortable quarters, and the common men disposed in cantonments open and extensive enough for air and exercise, and lodged in barracks as roomy and good as are provided by the party in whose power they are for their own troops¹⁵⁸

¹⁵⁶ See GARRETT, *supra* note 20, at 42-46; BOWMAN, *supra* note 25, at 41-56. In his June 26, 1786, letter to Jean Nicolas Demeunier, Jefferson asserted that the "death of upwards of 11,000 Americans in one prison ship (the Jersey)" was among the circumstances that had "produced a sense of the necessity of [an] article" on treatment of prisoners of war in the Treaty of Amity and Commerce with Prussia. THOMAS JEFFERSON, WRITINGS, *supra* note 4, at 590.

¹⁵⁷ See American Commissioners to Lord North, June, 1778, in 26 PAPERS OF BENJAMIN FRANKLIN, *supra* note 26, at 593 (draft protest over reports of American prisoners sent to Senegal); BOWMAN, *supra* note 25, at 10. In his June 26, 1786, letter to Jean Nicolas Demeunier, Jefferson accused the British of having "regularly sent our prisoners taken on the seas ... to the E. Indies." THOMAS JEFFERSON, WRITINGS, *supra* note 4, at 591.

¹⁵⁸ 6 PAPERS OF THOMAS JEFFERSON, *supra* note 21, at 486-87. This provision, as embodied in Article 24 of the Treaty of Amity and Commerce negotiated with Prussia, became the subject of debate within the United States government after American entry into World War I. See *also infra* note 163. The Army War College, the State Department, and the War Plans Division of the General Staff argued that this provision did not permit the United States to maintain German prisoners of war in camps in France, presumably because the camps would not be in an American "dominion" in Europe. General Pershing, the commander of United States forces in France, successfully opposed this view, and German prisoners of war captured by his army were kept in Europe. See LEWIS & MEWHA, *supra* note 25, at 52-53. In support of General Pershing's position, the historical context of the period from 1784 to 1785 indicates that this phrase was intended chiefly to prevent the transfer of prisoners to unhealthy climates.

Other parts of the draft article reflected, at least in part, Jefferson's experiences in administering custody of the Convention Army. These provisions included arrangements on the quality and financing of rations.

[T]he officers shall also be daily furnished by the party in whose power they are with as many rations and of the same articles and quality as are allowed by them either in kind or by commutation, to officers of equal rank in their own army, and all others shall be daily furnished by them with such ration as they allow to a common souldier [sic] in their own service: the value whereof shall be paid by the other party on a mutual adjustment of accounts for the subsistence of prisoners at the close of the war; and the said accounts shall not be mingled with, or set off against any others, nor shall the balances due on them be withheld as a satisfaction, or reprisal for any other article, or for any other cause real or pretended whatever¹⁵⁹

Similarly, the provisions on the appointment of commissaries of prisoners must be read in light of Jefferson's complaints about the ineptness of Virginia commissaries in supplying the Convention Army.

[E]ach party shall be allowed to keep a commissary of prisoners of their own appointment with every separate cantonment of prisoners in possession of the other, which commissary shall see the prisoners as often as he pleases, shall be allowed to receive and distribute whatever comforts^[160] may be sent to them by their friends, and shall be free to make his reports in open letters to those who employ him.¹⁶¹

Finally, the draft clearly reflected Jefferson's dispute with Benedict Arnold over whether parole violations should be punished by death or close confinement upon recapture.

.... But if any officer shall break his parole, or any other prisoner shall escape from the limits of his cantonment, after they shall have been designated to him, such individual soldier or other prisoner shall forfeit so much of the benefit of this article as provides for his enlargement on parole or cantonment.¹⁶²

¹⁵⁹6 PAPERS OF THOMAS JEFFERSON, *supra* note 21, at 487.

¹⁶⁰At a late stage in the drafting process, Jefferson had substituted "comforts" for "necessaries." See Note 33, *in id.* at 490.

¹⁶¹*Id.* at 487.

¹⁶²*Id.*

Of the three commissioners, Franklin and Jefferson appear to have played greater roles in drawing up these provisions than did John Adams, who remained skeptical of these proposals' practical value. After both the prisoner of war article and the article on civilians had been accepted for inclusion in the Treaty of Amity and Commerce with Prussia,¹⁶³ Adams commented condescendingly to the Prussian ambassador that he was "charmed" to find that the Prussian government had accepted "the Platonic philosophy of some of our articles, which are at least a good lesson to mankind, and will derive more influence from a treaty signed by the King of Prussia, than from the writings of Plato or Sir Thomas More."¹⁶⁴

XIII. Final Thoughts on the Laws of War

The Prussian treaty marked the end of Jefferson's involvement with the law of war as a public official. He and his fellow commissioners found no other European power willing to negotiate seriously with the weak central government they represented.¹⁶⁵ Within a few years, Jefferson came to oppose the conclusion of new commercial treaties by the United States.¹⁶⁶ Even as President, he made no effort to revive the old project of including provisions on the law of war in American treaties.¹⁶⁷

¹⁶³Entered into force Aug. 8, 1786, 8 Bevens 78, 8 Stat. 84, T.S. 292. Under Article 27, this treaty remained in force for ten years. It was replaced by a new Treaty of Amity and Commerce, signed July 11, 1799, 8 Bevens 88, 8 Stat. 162, T.S. 293. The treaty of 1799 reproduced Articles 23 and 24 of the earlier treaty, dealing with the laws of war. The one exception was the final clause of Article 23, prohibiting privateers, which was omitted in 1799. The treaty of 1799 remained in force until 1818. Articles 23 and 24 thereafter were continued in force until the end of World War I by the Treaty of Amity and Commerce with Prussia, signed May 1, 1828, 8 Bevens 98, 8 Stat. 378, T.S. 294. *See generally*, Reeves, *The Prussian-American Treaties*, 11 AM. J. INT'L L. 475 (1917).

¹⁶⁴Letter from John Adams to Baron de Thulemeier, Feb. 13, 1785, in 8 WORKS OF JOHN ADAMS 224 (Charles Adams ed., 1852) (1971 reprint).

¹⁶⁵*See* DUMAS MALONE, JEFFERSON AND THE RIGHTS OF MAN 24 (1951); *cf.* FREDERICK MARKS, INDEPENDENCE ON TRIAL 154 (1973).

¹⁶⁶*See* Letter to Elbridge Gerry, Jan. 26, 1799, in THOMAS JEFFERSON, WRITINGS, *supra* note 4, at 1055, 1057 ("I am not for linking ourselves by new treaties with the quarrels of Europe"); *cf.* HENRY ADAMS, HISTORY OF THE UNITED STATES DURING THE ADMINISTRATIONS OF THOMAS JEFFERSON 542-43 (1903) (Library of America ed., 1985) (attributing Jefferson's opposition to treaties to concern over ability to engage in commercial retaliation).

¹⁶⁷*But cf.* Treaty of Peace and Amity with Tripoli, art. 16, signed June 4, 1805, 11 Bevens 1081, 8 Stat. 214;

If in the fluctuation of human events a war should break out between the two nations, the prisoners captured by either party shall not be made slaves, but shall be exchanged rank for rank. ... And it is agreed that prisoners shall be exchanged in twelve months from the time of their capture; and that the exchange may be effected by

Perhaps he felt that the times were no longer auspicious for treaties advancing humanity in war. The behavior of Britain and France during the wars of the French Revolution and the Napoleonic era overturned his belief that contemporary international morality was always superior to that of the past. He became convinced that international behavior had declined radically since 1785.¹⁶⁸ "[T]he close of the [eighteenth] century saw the moral world thrown back again to the age of the Borgias, to the point from which it had departed 300 years before."¹⁶⁹

In this international climate, Jefferson was willing again to consider a policy of retaliation. His last recorded thoughts on securing enemy restraint in warfare followed the burning of Washington during the War of 1812. This disaster revived his frustrations over the activities of Colonel Hamilton and Benedict Arnold during the Revolution.

[T]he English have burnt our Capitol and President's house by means of their force. We can burn their St. James' and St. Paul's by means of our money, offered to their own incendiaries, of whom there are thousands in London who would do it rather than starve. But it is against the laws of civilized warfare to employ secret incendiaries. Is it not equally so to destroy the works of art by armed incendiaries? ... If a nation, breaking through all the restraints of civilized character, uses its means of destruction (power, for example) without distinction of objects, may we not use our means (our money and their pauperism) to retaliate their barbarous ravages? Are we obliged to use for resistance exactly the weapons chosen by them for aggression? ... Clearly not; ... and we should now be justifiable in the

any private individual legally authorized by either of the parties.

Tobias Lear, the American diplomat who negotiated the peace treaty apparently inserted this provision on his own initiative. Written instructions from the Jefferson Administration to Lear and his predecessor are silent on the subject of relations during future wars. *See* Letter from Secretary of State to Tobias Lear, June 6, 1804, *in* 4 NAVAL DOCUMENTS RELATING TO THE UNITED STATES WARS WITH THE BARBARY POWERS 155 (Dudley Knox ed., 1942) [hereinafter NAVAL DOCUMENTS]; Letter from Secretary of State to James Cathcart, Apr. 9, 1803, *in* 2 AMERICAN STATE PAPERS, FOREIGN AFFAIRS 701 (Walter Lowrie & Matthew Clarke eds., 1832); Letter from Secretary of State to James Cathcart, Apr. 18, 1802, *in* 2 NAVAL DOCUMENTS, *supra*, at 126-27. For a recent account of the negotiation of this treaty and events leading up to it, see A.B.C. WHIPPLE, *TO THE SHORES OF TRIPOLI* (1991).

¹⁶⁸ "But who in 1785 could foresee the rapid depravity which was to render the close of that century the disgrace of the history of man?" Letter to Benjamin Austin, Jan. 9, 1816, *in* THOMAS JEFFERSON, WRITINGS, *supra* note 4, at 1369, 1371.

¹⁶⁹ "Letter to John Adams, Jan. 11, 1816, *in id.* at 1374, 1375.

conflagration of St. James' and St. Paul's. And if we do not carry it into execution, it is because we think it more moral and honorable to set a good example, than to follow a bad one.¹⁷⁰

Even during a period of moral decay, however, Jefferson continued to entertain at least the possibility that restraint and moral suasion were preferable to direct retaliation in the face of "barbarous ravages" by the enemy.

One final piece of indirect evidence supports the view that Jefferson did not abandon all hope of promoting humanity in war through treaty provisions. In 1824, Jefferson's granddaughter married Nicholas Trist, whose family had longstanding ties to Jefferson's. The newlyweds lived at Monticello during the last two years of Jefferson's life while Trist studied law under him.¹⁷¹ The young man and the old statesman became close. Trist was one of two family members who kept watch at Jefferson's deathbed, and he was named in Jefferson's will as one of the trustees of his residuary estate.¹⁷² Trist also apparently regarded himself as trustee of Jefferson's moral legacy, and refused to allow Andrew Jackson's campaign biographer to invoke Jefferson's name.¹⁷³

Twenty years later, in 1847, Nicholas Trist was sent to Mexico to negotiate a peace treaty, ending the war of 1846 to 1848. The resulting Treaty of Guadalupe-Hidalgo contains an article intended to apply "[i]f (which is not to be expected, and which God forbid!) war should unhappily break out between the two republics."¹⁷⁴ This article clearly was patterned after the law of war provisions of the 1785 Treaty with Prussia. Trist's instructions, however, contained no mention of this subject.¹⁷⁵ Rather, he proposed this article on his own, when other American officials had no interest in reviving Franklin's and Jefferson's initiatives on the law of war. Trist presumably learned to value these initiatives during his years at Monticello.

¹⁷⁰Letter to Dr. Thomas Cooper, Sept. 10, 1814, *in* 14 WRITINGS OF THOMAS JEFFERSON 179, 186-87 (A. Lipscomb ed., 1905).

¹⁷¹See DUMAS MALONE, *THE SAGE OF MONTICELLO* 371-72, 454 (1981).

¹⁷²See *id.* at 488, 497.

¹⁷³See Trist, Nicholas, *in* 9 DICTIONARY OF AMERICAN BIOGRAPHY 645 (Dumas Malone ed., 1935-36).

¹⁷⁴Treaty of Peace, Friendship, Limits and Settlement with Mexico, art. 22, signed Feb. 2, 1848, 9 Bevens 791, 9 Stat. 922. For a general account of Trist's mission to Mexico, see K. JACK BAUER, *THE MEXICAN WAR 1846-1848*, at 282-83, 378-87 (1974).

¹⁷⁵See Letter from Secretary of State to Nicholas P. Trist, Apr. 15, 1847, *in* 8 DIPLOMATIC CORRESPONDENCE OF THE UNITED STATES: INTER-AMERICAN AFFAIRS, 1831-1869, at 201-07 (W. Manning ed., 1937).

XIV. Conclusion: Jefferson's Experience and the Modern Law of War

Jefferson's pursuit of humanity in war visited three distinct phases. An early, largely unsuccessful, reliance on appeals to reason and threats of retaliation gave way after the Revolution to a diplomatic effort to advance the rights of noncombatants through bilateral treaties. Finally, in the face of state practice during the Napoleonic Wars, Jefferson again considered the utility of retaliation during a period of declining international morality. Not surprisingly, this pattern reflects the general development of Jefferson's political philosophy.¹⁷⁶

In many respects, Jefferson's experience also parallels, in microcosm, the development of the laws of war in the nineteenth and twentieth centuries. "The law of war can no more wholly dispense with retaliation than can the law of nations, of which it is a **part**,"¹⁷⁷ declared the Lieber Code of 1862. Nevertheless, like the view held by Jefferson during the Revolutionary War, the development of the laws of war during the twentieth century evinces a distaste for retaliation as a satisfactory means of enforcing humanitarian standards in war. Accordingly, a growing number of international conventions prohibit retaliation against certain persons or objects.¹⁷⁸

¹⁷⁶"**Predominantly** Lockean in his early, revolutionary writings (especially in the Declaration of Independence), ... after the Revolution, Jefferson's philosophy assumed a more classical republican quality," stressing the importance of promoting republican virtue against the corruptions of court. GARRETT SHELTON, *THE POLITICAL PHILOSOPHY OF THOMAS JEFFERSON* 2 (1991). This 1780s journey—from the rationalist individualism of John Locke to classical republican virtue—paralleled Jefferson's turn, during the same time period, from appeals to reason and threats of retaliation to promoting civic virtue at the international level through treaty provisions on the law of war.

"Headquarters, United States Army, Gen. Orders No. 100, Instructions for the Government of Armies of the United States in the Field, art. 27 (Lieber Code), *in* *THE LAWS OF ARMED CONFLICTS* 3, 7 (Dietrich Schindler & Jiri Toman eds., 2d ed. 1981). On the significance of the Lieber Code, see generally RICHARD HARTIGAN, *LIEBER'S CODE AND THE LAW OF WAR* (1983); ARTHUR NUSSBAUM, *A CONCISE HISTORY OF THE LAW OF NATIONS* 227 (rev. ed. 1954).

¹⁷⁸**Because** of abuses during World War I, all reprisals against prisoners of war were forbidden by Article 2 of the Geneva Convention on Prisoners of War, signed July 27, 1929, 47 Stat. 2021, T.S. 847. This prohibition is continued in Article 13 of the current Geneva Convention (III) on Prisoners of War, signed Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135. The 1949 Geneva Conference also prohibited reprisals against interned civilians and the inhabitants of occupied territory. *See* Geneva Convention (IV) on Civilians, art. IV, signed Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287; *see also* Hague Convention on Cultural Property in Armed Conflict, art. IV, para. 4, signed May 14, 1954, 249 U.N.T.S. 240 (prohibiting reprisals directed against cultural property); Protocol I Additional to the Geneva Conventions, arts. 51-56, adopted June 8, 1977, *in* *THE LAWS OF ARMED CONFLICTS* *supra* note 177, at 551, 581-84 (prohibiting reprisals against all civilians, civilian property, historic monuments, cultural objects and places of worship constituting the "cultural or spiritual

The diplomatic responses to the developments of the twentieth century also parallel Franklin's and Jefferson's efforts of the 1780s. The rights of noncombatants and international standards for their treatment have been defined with increasing precision and length in international agreements—even though these provisions typically have appeared in multilateral agreements, rather than in the series of bilateral arrangements envisaged by Franklin and Jefferson.¹⁷⁹ In addition, many modern agreements on the law of war require parties to disseminate the contents of those agreements to their military personnel.¹⁸⁰ Jefferson, who strongly believed in education as a means of promoting civic virtue, clearly would have approved of this approach to humanitarian law.

Unfortunately, none of these approaches has proved to be a panacea, either now or in Jefferson's era. The brutal history of the twentieth century witnesses that the practice of belligerents has failed to keep pace with the development of international humanitarian law. Perhaps the most important lesson to be derived from Jefferson's experience is that this problem will persist as long as war itself. Only an eclectic strategy, drawing on all available tools and approaches, offers any hope of curbing the inhumanity of modern war.

heritage of peoples," objects indispensable to civilian survival, the natural environment, and certain dams, dikes and nuclear power stations). For the history and rationale of these provisions, see generally FRITS KALSHOVEN, *BELLIGERENT REPRISALS* 69-82, 263-77 (1971); C.J. Greenwood, *Reprisals and Reciprocity in the New Law of Armed Conflict in ARMED CONFLICT AND THE NEW LAW* 227 (Michael Meyer ed., 1989); Remigiusz Bierzanek, *Reprisals as a Means of Enforcing the Laws of Warfare: The Old and the New Law, in THE NEW HUMANITARIAN LAW OF ARMED CONFLICT* 232 (Antonio Cassese ed., 1979).

¹⁷⁹The 1907 Hague Regulations, annexed to the Hague Convention IV, on the Laws and Customs of War on Land, signed October 18, 1907, 36 Stat. 2277, T.S. 539, codified 56 articles on the laws and customs of land warfare, including the treatment of prisoners of war and government of occupied territory. In 1949, it was supplemented by 143 articles in the Geneva Convention (III) on Prisoners of War, signed August 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135, and by an additional 159 articles in the Geneva Convention (IV) on Civilians, signed August 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287. These conventions since have been supplemented by another 102 articles in Protocol I Additional to the Geneva Conventions, adopted June 8, 1977, in *THE LAWS OF ARMED CONFLICTS*, *supra* note 177, at 551, 581-84.

¹⁸⁰*See, e.g.*, Geneva Convention (III) on Prisoners of War, art. 127, signed August 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135; Geneva Convention (IV) on Civilians, art. 144, signed August 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287.

JURY NULLIFICATION: A CALL FOR JUSTICE OR AN INVITATION TO ANARCHY?

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MAJOR MICHAEL J. DAVIDSON**

If a jury possesses ... [the power to nullify] as a “right,” it is illogical that it is not so instructed. How can the jury exercise its right to pardon if it is ignorant of it and is told quite to the contrary by the standard instructions?¹

I. Introduction

Axiomatically, a jury² in criminal cases “has the power to bring in a verdict in the teeth of both law and facts.”³ The jury possesses a general veto power and may acquit when it has no sympathy for the Government’s case,⁴ no matter how overwhelming the evidence of guilt.⁵ A jury acquittal is final and unreviewable; a judge may not direct a jury to convict or vacate

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¹Keenan v. State, 379 So.2d 147, 148 (Fla. App. 1980).

²For purposes of this article, the authors use the civilian term “jury” interchangeably with its military equivalent, the “panel.”

³Horning v. District of Columbia, 254 U.S. 135, 138 (1920); United States v. Trujillo, 714 F.2d 102, 105 (11th Cir. 1983); see also Beckwith v. State, 386 So.2d 836, 842 (Fla. App. 1980).

⁴United States v. Wilson, 629 F.2d 439, 443 (6th Cir. 1980).

⁵A court does not have the power to order the jury to return a verdict of guilty, even in the face of overwhelming evidence of guilt. United States v. Spock, 416 F.2d 165, 180 (1st Cir. 1969); cf. Smelcher v. Attorney Gen. of Ala., 947 F.2d 1472, 1476 (11th Cir. 1991) (“It is beyond dispute that a judge may not direct a verdict of guilty in a criminal jury trial”). As an illustration, jurors in the trial of Washington, D.C.’s former mayor Barry, stated that they knew he was guilty of several charges, but convicted him of only one charge because they believed the government unfairly had targeted Barry on racial grounds. *Courtroom Putsch? Jurors Should Reject Laws They Don’t Like, Activist Group Argues*, WALL ST. J., Jan. 4, 1991, at 4, col. 2 [hereinafter *Courtroom Putsch?*]; see also *D.C. Man Acquitted By Racial Sympathy Guilty in 2nd Murder*, WASH. POST, July 27, 1991, at B3, col. 4.

an acquittal, nor may a prosecutor appeal an acquittal on grounds of judicial error or erroneous jury determination.⁶ Judges have little, if any, control over criminal jury acquittals.⁷ As the United States Court of Appeals for the Fourth Circuit noted in *United States v. Moylan*,⁸ "If the jury feels that the law under which the defendant is accused is unjust, or that exigent circumstances justified the actions of the accused, or for any reason which appeals to their logic or passion, the jury has the power to acquit, and the courts must abide by that decision."⁹

Jury nullification is not a "defense" recognized by the law, but rather is a mechanism by which a jury, acting as the community conscience, effectively is permitted to disregard the letter of the law by determining that applying it to a particular case would not be justified.¹⁰ More specifically, nullification occurs when a jury finds that the defendant is technically guilty of the charged offense, but deliberately refuses to render a conviction.¹¹ Accordingly, jury nullification arises under circumstances identical to those that would lead to a directed verdict in a civil trial.¹² Under a hypothetical "directed conviction" standard, a precondition to jury nullification would be the judge's determination that no dispute as to the facts existed, making the defendant guilty as a matter of law.¹³ The absence of the facility to render a directed conviction in criminal cases therefore gives rise to the possibility of jury acquittals, notwithstanding a defendant's otherwise veritable guilt.

⁶Weinberg-Brodt, "Jury Nullification And Jury Control Procedures," 65 N.Y.U. L. REV. 825, 828 (1990) (citations omitted). The nullification power is attributable to the criminal jury's right to return a general verdict, which does not specify how it applied the law to the facts, and the constitutional bar against double jeopardy. *Ballard v. Uribe*, 715 P.2d 624, 647 (Cal. 1986) (Bird, C.J., dissenting and concurring); *State v. Lane*, 629 S.W.2d 343, 346 (Mo. 1982) (en banc) (power exists "because once the verdict is entered it cannot be impeached and the defendant retried").

⁷Weinberg-Brodt, *supra* note 6 at 828; *see also* *People v. Dillon*, 668 P.2d 697, 729 (Cal. 1983) (Kaus, J., concurring) (jury is immune from legal sanctions for rendering a perverse acquittal).

⁸417 F.2d 1002 (4th Cir. 1969).

⁹*Id.* at 1006.

¹⁰*United States v. Dougherty*, 473 F.2d 1113, 1140 (D.C. Cir. 1972) (Bazelon, C.J., dissenting).

¹¹*See* Smythers, *Equitable Acquittals: Prediction And Preparation Prevent Post-Panel Predicaments*, ARMY LAW., April 1986, at 3 (author opines that nullification occurs most frequently in the military setting at special courts-martial involving minor offenses in which the consequence of conviction—that is, ruining the career of an otherwise good soldier—often appears unjust).

¹²Weinberg-Brodt, *supra* note 6, at 826 & n.1.

¹³*Id.* at 826 n.1.

Although jury nullification occurs infrequently,¹⁴ the prevailing judicial opinion steadfastly has been opposed to permitting the jury to *know* that it has the power to acquit "in the teeth of both the law and facts."¹⁵ This article examines the historical precedent of jury nullification; the current case law addressing the issue; various arguments opposed to, and in favor of, a jury nullification instruction; and the permissibility of nullification argument. Additionally, this article advances the propositions that a court has the discretion to permit both an instruction and nullification argument; and, under the proper circumstances, a carefully structured instruction would serve the ends of justice without opening the courthouse doors to anarchy. Further, this article proposes an addition to the prefatory instructions on findings that, if permitted, would inform the jury—or court-martial panel—of its power to acquit the accused when the members cannot in good conscience support a guilty verdict.

11. Historical Perspective

A. Early Precedent

The legal tradition of the jury as the protector of the rights of the accused in a criminal trial is deeply rooted in common law and predates the arrival of the first English colonists to America's shores. The jury's veto power often is traced to the acquittal of Sir Nicholas Throckmorton, charged with high treason, in 1544.¹⁶ In

¹⁴In 19% of all criminal trials tried before a jury, juries acquit defendants whom judges would have convicted. Of this number, only 21% are attributed to jury nullification. *Id.* at 826 n.5 (citing H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* 58, 116 (1966)). Studies show that juries are most lenient with defendants who exceed the bounds of law while acting in self-defense, such as battered wives, and with street crime victims who retaliate against their attackers. *Courtroom Putsch?*, *supra* note 5, at 4, col. 2. One military judge has listed the common traits concerning military defendants who were acquitted at special courts-martial as follows: (1) the accused was viewed as a victim; (2) the accused appeared as an excellent soldier; (3) the victim or an essential Government witness presented an unfavorable character from a military point of view; and (4) the accused had a tremendous amount to lose if convicted, such as many years of honorable service, retirement pay, or income for family support. Smythers, *supra* note 11, at 5-6.

¹⁵No federal circuit or military appellate court has ruled in favor of a nullification instruction. Weinberg-Brodt, *supra* note 6, at 837 n.74; United States v. Schroeder, 27 M.J. 87, 90 (C.M.A. 1988); United States v. Smith, 27 M.J. 25, 29 (C.M.A. 1988); United States v. Mead, 16 M.J. 270, 275 (C.M.A. 1983) ("While civilian juries and court-martial members always have had the power to disregard instructions ... they need not be advised as to this power, even upon request by a defendant"); cf. Williams v. Commonwealth, 644 S.W.2d 335, 339 (Ky. 1982) (court refused to give nullification instruction); Ballard v. Uribe, 715 P.2d 624, 647 (Cal. 1986) (Bird, C.J.) ("this court has never approved of jury nullification").

¹⁶Throckmorton's participation in Wyatt's Rebellion was beyond doubt, but he was politically popular with the jury that acquitted him. "From now onwards the jury enters on a new phase of its history, and for the next three centuries it

1670, a London jury refused to follow the judge's instruction to convict William Penn and William Mead for preaching to an unlawful assembly.¹⁷ For their disobedience, Bushell and the other jurors were fined and Bushell jailed,¹⁸ still insisting on the right to make the final determination of the guilt or innocence of the accused.

In *Bushell's Case*,¹⁹ Bushell filed a habeas corpus petition, seeking his release. Holding that jurors could never be punished for their verdicts, Sir John Vaughan, Chief Justice of the Common Pleas—after holding a conference on the matter with all the judges of England—released Bushell. Bushell's release effectively vindicated the absolute power of English juries to nullify without fear of punishment.²⁰

Colonial American juries periodically refused to convict violators of British laws, regularly refusing to enforce navigation acts designed to funnel all colonial trade through England. The subsequent British exclusion of colonial juries from maritime cases was a source of great bitterness among the colonists and provided one of the many grievances that eventually led to the American Revolution.²¹

Jury nullification was common during the early nineteenth century in prosecutions for seditious statements. In particular, it proved to be an important tool for abolitionists in antebellum America, who often were charged with violating the fugitive slave laws.²² Acquittals in these cases proceeded from the belief that,

will exercise its power of veto on the use of the criminal law against political offenders who have succeeded in obtaining popular sympathy." *Wilson*, 629 F.2d at 443 (citing *PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW* 133-34 (5th ed. 1956)); *United States v. Krzyske*, 836 F.2d 1013, 1022 (6th Cir. 1988) (Merritt, J., dissenting).

¹⁷Penn—who eventually would found the colony of Pennsylvania—like Mead, was a Quaker. The Quakers comprised members of a newly formed Protestant group who espoused an unorthodox religious doctrine. Viewed as radicals, the English government closed their meeting houses and forbade them from assembling or preaching in the streets. V. HANS & N. VIDMAR, *JUDGING THE JURY* 21 (1986).

¹⁸*Sparf and Hansen v. United States*, 156 U.S. 51, 119 (1895) (Gray, J., dissenting). Bushell was jailed for not paying the fine. *Id.*

¹⁹Vaughan, 124 Eng. Rep. 1006 (1670).

²⁰Weinberg-Brodt, *supra* note 6, at 829-30; *People v. Dillon*, 668 P.2d 697, 729 (Cal. 1983) (Kaus, J., concurring) ("thenceforth a jury was immune from legal sanctions for rendering a perverse acquittal").

²¹Schefflin & Van Dyke, *Jury Nullification: The Contours of a Controversy*, 43 LAW & CONTEMP. PROBS. 51, 57 & n.20 (1980).

²²HANS & VIDMAR, *supra* note 17, at 149; REMBAR, *THE LAW OF THE LAND* 366 (1980). Enacted in 1850, the Fugitive Slave Laws outlawed assisting escaping slaves or obstructing efforts to recapture them. HANS & VIDMAR, *supra* note 17, at 149.

because the laws themselves were wrong, jurors could refuse to enforce them.²³

Until the end of the nineteenth century, juries were told frequently that they had the power to reject the judge's view of the law.²⁴ From 1776 through 1800, only one judge in the United States was known to have denied the members of a jury the right to decide law in criminal cases, according to their own judgments and consciences. That judge, thereafter, was impeached and removed from the bench.

B. The Sparf and Hansen Case

In 1895, the United States Supreme Court decided a case that still universally is regarded as the decisive case disapproving of jury nullification and nullification instructions.²⁵ In *Sparf and Hansen v. United States*,²⁶ two convicted murderers appealed the trial judge's instruction to the jury informing it that, although it had the power to convict the defendants of the lesser crime of manslaughter, the law required the members either to render a verdict of not guilty or to convict the defendants of the charged crime of murder.²⁷ The Supreme Court rejected the defendants' argument. The Court acknowledged that the evidence tended to show that the defendants were guilty of manslaughter. Accordingly, the judge's decision to instruct the jury that they could not, consistent with the law, return a verdict of guilty for that crime—as opposed to the charged crime—did not constitute error.²⁸ Although the Court opined that jury members did not have the “right” to disregard the law as explained to them by the court,²⁹ it never criticized the trial judge's instruction informing the jury that it had the “power” to return a verdict of manslaughter, despite the evidence.³⁰

²³REMBAR, *supra* note 22, at 366. Similarly, juries in the early part of this century regularly refused to enforce the unpopular prohibition laws. *Id.* at 367.

²⁴*Id.* at 54.

²⁵Weinberg-Brodt, *supra* note 6, at 832 n. 37; see *United States v. Moylan*, 417 F.2d 1002, 1006-07 (4th Cir. 1969), *cert. denied*, 397 U.S. 910 (1970); *United States v. Dellinger*, 472 F.2d 340, 408 (7th Cir. 1972); *United States v. Drefke*, 707 F.2d 978, 982 (8th Cir. 1983); *United States v. Washington*, 705 F.2d 489, 494 (D.C. Cir. 1983).

²⁶156 U.S. 51 (1895).

²⁷*Id.* at 60-63. The judge refused to instruct the members of the jury that they could convict the defendants of the lesser crimes of manslaughter, attempted murder, or attempted manslaughter. *Id.* at 112.

²⁸*Id.* at 101.

²⁹“Public and private safety alike would be in peril, if the principle be established that juries in criminal cases may, of right, disregard the law as expounded to them by the court and become a law unto themselves.” *Id.*

³⁰Scheflin & Van Dyke, *supra* note 21, at 62.

After a lengthy review of British and American legal history, the *Sparf and Hansen* dissent noted that the jury had the power to acquit and such a verdict could not be set aside even when rendered in direct contravention to the instructions of the judge.³¹ The dissent then addressed the argument that, although the jury ordinarily would have this power, it nevertheless had no right to violate its obligations to follow the judge's instructions in matters of law. Specifically, it responded that "a legal duty which cannot in any way, directly or indirectly, be enforced, and a legal power, of which there can never, under any circumstances, be a rightful and lawful exercise, are anomalies."³² The dissent continued, arguing that the 'law must, however, have intended, in granting this power to a jury, to grant them a lawful and rightful power, or it would have provided a remedy against the undue exercise of it."³³ The dissent criticized the majority opinion for creating an illogical, unworkable system that protected a jury's "power" to nullify, while simultaneously proclaiming that a jury had no "right" to exercise this power.³⁴

Commentators correctly have criticized the judicial reliance on *Sparf and Hansen* for the proposition that the defendant has no right to a nullification instruction. They point out that the trial judge in that case had informed the jury specifically of its power to ignore his instructions.³⁵ Accordingly, these commentators emphasize that the exact issue decided in *Sparf and Hansen* was whether the judge was correct in admonishing the jury that use of nullification power was wrongful. Furthermore, they assert that any language in the *Sparf and Hansen* opinion that appears to disapprove of jury nullification instructions is merely dictum.³⁶

Alternatively, some commentators attempt to interpret the *Sparf and Hansen* Court's ruling as upholding the principle that a jury cannot convict—even of a lesser crime when acting out of leniency—in the absence of evidence beyond a reasonable doubt.³⁷

³¹*Sparf and Hansen*, 156 U.S. at 172 (Gray, J., dissenting).

³²*Id.* at 173.

³³*Id.* at 148.

³⁴Weinberg-Brodth, *supra* note 6, at 832 (citing *Sparf and Hansen*, 156 U.S. at 148 (Gray, J., dissenting)).

³⁵*Sparf and Hansen*, 156 U.S. at 60. The trial judge instructed the jury that "it may be in the power of the jury ... of finding them guilty of a less crime than murder, to wit, manslaughter ... yet, as I have said in this case, if a felonious homicide has been committed at all, of which I repeat you are the judges, there is nothing to reduce it below the grade of murder." *Id.*

³⁶Weinberg-Brodth, *supra* note 6, at 832 n.37; Schefflin & Van Dyke, *supra* note 21, at 62 ("the majority opinion ... cannot be viewed as a *holding* rejecting the modern concept of jury nullification"); *cf.* *People v. Dillon*, 668 P.2d 697, 729 (Cal. 1983) (Kaus, J., concurring) ("the issue was formulated as being whether questions of law, as well as of fact, should be left to the jury").

³⁷Schefflin & Van Dyke, *supra* note 21, at 62 n.40.

The facts in *Sparf and Hansen* indicate that the jury actually was considering a conviction for such a lesser crime. Nevertheless, the Supreme Court upheld the defendants' convictions for murder despite evidence that supported the jury's instincts on the lesser crime of manslaughter.³⁸ Additionally, several recent Supreme Court decisions have described the jury's chief function as political and the Court has consistently held that the jury cannot be limited to a single class, but must represent the entire community.³⁹ Accordingly, this line of decisions can be interpreted as suggesting that the Court supports the infusion of community sentiments in jury verdicts, and would sanction occasional jury verdicts that conflicted with unfair laws or oppressive prosecutorial practices.⁴⁰

C. Modern Precedent and Legislative Efforts

Although jury nullification continued to occur following the *Sparf and Hansen* decision,⁴¹ federal courts did not address the nullification instruction issue.⁴² The jury nullification issue returned to the legal spotlight during the politically charged criminal trials of the Vietnam War era, when draft resisters and other protestors began to demand that juries be informed of the power to nullify.⁴³ Defense attorneys sought a means by which the jury, as the conscience of the community, could consider the

³⁸*Id.*; see also *Sparf and Hansen*, 156 U.S. at 61 n.1. In support of the argument, these commentators point to *United States ex rel. Matthews v. Johnson*, 503 F.2d 339 (3d Cir. 1974), *cert. denied sub nom. Cuyler v. Matthews*, 420 U.S. 952 (1975).

³⁹**HANS & VIDMAR**, *supra* note 17, at 157. The Supreme Court has stated that the "right to jury trial is granted to criminal defendants in order to prevent oppression by the Government." *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968). The Court also has indicated that the jury's purpose is "to guard against the exercise of arbitrary power—to make available the common sense judgment of the community as a hedge against the overzealous prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge." *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975); **HANS & VIDMAR**, *supra* note 17, at 157.

⁴⁰**HANS & VIDMAR**, *supra* note 17, at 157.

⁴¹**Weinberg-Brodt**, *supra* note 6, at 836 n.67. During the 1920s, juries frequently nullified in prohibition cases. *Id.*

⁴²*Id.*

⁴³**Weinberg-Brodt**, *supra* note 6, at 836; **HANS & VIDMAR**, *supra* note 17, at 156 (attorneys attempted to argue that civil disobedience was justified on basis of questionable legality and morality of the war). See *United States v. Dougherty*, 473 F.2d 1113 (D.C. Cir. 1972) (defendants vandalized Dow Chemical Co., which produced napalm, discussed in **REMBAR**, *supra* note 22, at 363-64); *United States v. Dellinger*, 472 F.2d 340, 408 (7th Cir. 1972) (protest demonstrations); *United States v. Simpson*, 460 F.2d 515 (9th Cir. 1972) (burned records of local draft board); *United States v. Moylan*, 417 F.2d 1002, 1008 (4th Cir. 1969), *cert. denied*, 397 U.S. 910 (1970) (defendants burned draft records to protest Vietnam War); *United States v. Boardman*, 419 F.2d 110, 116 (5th Cir. 1969) (conscientious objector refused to perform alternate civilian service).

morality of the defendant's conduct.⁴⁴ These defense attorneys attempted to convert a jury's implicit power to nullify into an explicit right of criminal juries and criminal defendants.⁴⁵ More recently, criminal defendants have sought jury nullification instructions in cases involving abortion,⁴⁶ tax evasion,⁴⁷ nuclear weapon protests,⁴⁸ and statutory rape.⁴⁹

Occasionally, a defendant would succeed in having either the judge or counsel inform the jury of its power to acquit despite the defendant's technical guilt.⁵⁰ For instance) in *United States v. Jimmy L. DeSirey*,⁵¹ the court, over the Government counsel's objection) permitted nullification-related voir dire, a nullification instruction,⁵² and nullification argument in a prosecution for operating an illegal gambling business.⁵³ The trial judge instructed the jury members that if they were not in sympathy with the Government's case, they could return a not-guilty verdict.⁵⁴ Accordingly, the jury did return with a verdict of "Not Guilty"

⁴⁴Scheflin & Van Dyke, *supra* note 21, at 63.

⁴⁵Weinberg-Brodth, *supra* note 6, at 836 n.67; *cf.* *United States v. Anderson*, 716 F.2d 446, 449 (7th Cir. 1983).

⁴⁶*Anderson*, 716 F.2d at 446 (abortion protest-related abduction of doctor and his wife).

⁴⁷*See infra* note 87.

⁴⁸*State v. Campa*, 494 A.2d 102 (R.I. 1985) (painted "thou shall not kill" on several *Trident* ZZ submarine missile tubes).

⁴⁹*State v. Pease*, 740 P.2d 659 (Mont. 1987).

⁵⁰Weinberg-Brodth, *supra* note 6, at 836 & n.69; *United States v. Anderson*, No. 602-71, trans. at 8386-94 (D.N.J. 1973) (trial judge instructed the jury that it could follow its conscience and acquit a guilty defendant); *see* *United States v. Krzyske*, 836 F.2d 1013, 1021 (6th Cir. 1988) (defense counsel permitted to mention jury nullification in closing argument); *cf.* *State v. Weitzman*, 427 A.2d 3, 7 (N.H. 1981) (judge instructed, "You are entitled to act upon your own conscientious feeling about what is a fair result in this case").

⁵¹No. 3-90-00083 (M.D. Tenn., Dec. 1991) (Wiseman, J.).

⁵²The Government's counsel attempted to prevent this instruction by requesting a stay from the trial court and obtaining a writ of mandamus from the Sixth Circuit. The trial court refused to grant the stay. Accordingly, the Sixth Circuit was unable to rule on the issue. Telephone interview with Robert J. Washko, Assistant United States Attorney, Middle District of Kentucky (Aug. 17, 1992).

⁵³*See* 18 U.S.C. § 1955 (1988). During a pretrial motion to suppress, the trial judge determined that an Internal Revenue Service (IRS) agent improperly used information submitted by the defendant, pursuant to 26 U.S.C. § 4412, for the purpose of obtaining a search warrant. The court, however, denied the motion to suppress, ruling that the disclosure was harmless error in light of other, independently obtained evidence. To forestall the court's determination that the IRS agent acted improperly from becoming an issue at trial, the Government's counsel tried the defendant in two separate proceedings—the first trial for illegal gambling and the second trial for filing false income tax returns. Nevertheless, the defense counsel successfully built his nullification case around the judge's determination. Telephone interview with Robert J. Washko, *supra* note 52.

⁵⁴Telephone interview with Robert J. Washko, *supra* note 52.

explaining to the court that although the members believed that ample evidence to convict existed, they were not sympathetic to the Government's case.⁵⁵

In 1971, Kansas trial judges were given the discretion to read a nullification instruction to the jury.⁵⁶ Two years later, however, the Kansas Supreme Court rejected the instruction.⁵⁷ In Indiana and Maryland, however, juries are allowed to decide both facts and the law—relegating the judge's instruction regarding the law as advisory only.⁵⁸

Recently, a heterogeneous body of jury nullification advocates has organized to pursue legislation requiring that juries be made aware of their unfettered powers to acquit. The Fully Informed Jury Association (FIJA), based in Helmville, Montana, has organized an uncommon array of supporters along the common theology of jury nullification. The *American Bar Association Journal* reported that the FIJA “draws its support from a wide and unusual spectrum of political thought—from the National Rifle Association to gun control advocates, from abortion

⁵⁵ *Id.*

⁵⁶ The following instruction, which could not be given over the objection of the defense counsel, was used in Kansas criminal trials:

It is presumed that juries are the best judges of fact. Accordingly, you are the sole judges of the true facts in this case.

I think it requires no explanation, however, that judges are presumed to be the best judges of the law. Accordingly, you must accept my instructions as being correct statements of the generally accepted legal principles that apply in a case of the type you have heard. . . . These principles are intended to help you in reaching a fair result in this case. . . . You should do just that if, by so doing, you can do justice in this case. Even so, it is difficult to draft legal statements that are so exact that they are right for all conceivable circumstances. *Accordingly, you are entitled to act upon your conscientious feeling about what is a fair result in this case and acquit the defendant if you believe that justice requires such a result.* Exercise your judgment without passion or prejudice, but with honesty and understanding. Give respectful regard to my statements of the law for what help they may be in arriving at a conscientious determination of justice in this case. That is your highest duty as a public body and as officers of this court.

Pattern Instructions for Kansas 51.03, at 36 (1971), *cited in* Schefflin & Van Dyke, *supra* note 21, at 64 (emphasis added).

⁵⁷ *State v. McClanahan*, 510 P.2d 153 (1973), *discussed in* Schefflin & Van Dyke, *supra* note 21, at 64-65.

⁵⁸ *HANS & VIDMAR*, *supra* note 17, at 157. In Maryland, the judge instructs the jury that it is free to reject the judge's advice on the law. *Id.* Maryland and Indiana are the only states to grant such discretion to their juries. *Id.* Modern jury nullification advocates have abandoned the notion that the jury be allowed to decide both law and fact and, instead, base their arguments on the jury's right or power to reject the law if its members' consciences do not permit them to follow the judge's instructions. *People v. Dillon*, 668 F.2d 697, 729 (Cal. 1983) (Kaus, J., concurring).

rights supporters to their opponents, and from backers of marijuana legalization to law-and-order types."⁵⁹ This grass-root organization, with designated coordinators in forty-five states, lobbies state legislators, distributes pamphlets to potential jurors reporting for duty, and lectures civic groups across the country.⁶⁰

Organized jury nullification lobbyists now operate in thirty-five states and have persuaded legislators to champion jury nullification bills in several states.⁶¹ Despite their efforts, however, not a single federal or military appellate court has found error in a judge's refusal to give such an instruction,⁶² even when the instruction actually was requested by the jury.⁶³

111. Arguments Supporting the Nullification Instruction

Proponents of a jury nullification instruction offer several arguments in its favor. One argument suggests that failure to instruct a jury of its nullification power is a means of deceit perpetrated on the jury.⁶⁴ In *United States v. Krzyske*, after deliberating for several hours, the jury specifically requested to be instructed on "jury nullification."⁶⁵ The trial judge responded by telling the jury erroneously that it had no power to engage in jury nullification.⁶⁶ The jury subsequently returned a verdict of "guilty" for tax evasion and failure to file income tax returns.⁶⁷

⁵⁹Cilwick, *Power to the Juries*, A.B.A. J., July 1991, at 18. The *Wall Street Journal* described a recent FIJA conference with the following succinct description: "As the room filled up, pot smokers mingled with church ladies and tree lovers swapped stories with gun buffs." *Courtroom Putsch?*, *supra* note 5, at 1, col. 1.

⁶⁰FIJA ACTIVIST *passim* (Winter 1992). The FIJA looks beyond single-issue disputes and sees their prospects as win-win situations. Whether or not they are successful in the legislatures or the courtrooms, FIJA activists are confident that their efforts are producing better informed jurors. Cilwick, *supra* note 59, at 18.

⁶¹See *Courtroom Putsch?*, *supra* note 5, at 1, col. 1 (citing proposed legislation in New York, Arizona, and Montana); *Group Aims For 'Conscientious' Juries*, 19 M.L.W. 1131, 1135 (1991) (proposed legislation in Massachusetts).

⁶²See *supra* note 11. But cf. *State v. Brown*, 567 A.2d 544, 548 (N.H. 1989) (while defendant is not entitled to a nullification instruction, the trial court retains the discretion "to determine whether or not the facts of a particular case warrant such an instruction when it has been requested by a party") (citing *State v. Mayo*, 480 A.2d 85, 87 (1984)).

⁶³*United States v. Krzyske*, 836 F.2d 1013 (6th Cir. 1988); cf. *People v. Dillon*, 668 P.2d 697, 728 (Cal. 1983).

⁶⁴Schefflin & Van Dyke, *supra* note 21 at 105-06; cf. *United States v. Dougherty*, 473 F.2d 1113, 1139, 1144 (D.C. Cir. 1972) (Bazelon, C.J., dissenting) ("lack of candor") ("devising stratagems which let us pretend that the power of nullification does not even exist").

⁶⁵836 F.2d 1013, 1021 (6th Cir. 1988) (Merritt, J., dissenting).

⁶⁶*Id.*

⁶⁷*Id.* at 1015.

The type of situation that arose in *Krzske* arguably makes jurors less likely to respect a legal system because they feel coerced into convicting based on the judge's instructions, only to learn after trial, that they could have voted their consciences and acquitted.⁶⁸ Accordingly, supporters of the jury nullification instruction assert that the price of candor—a few more seemingly irrational acquittals—would be worth the benefit to our democratic system and the individual citizen's pride in judicial participation.⁶⁹

Another argument in favor of the jury nullification instruction contends that failing to inform the jury of its power to nullify usurps its basic function—that is, to serve as the conscience of the community and to safeguard the individual citizen from unfair laws and oppressive prosecutorial practices.⁷⁰ Noted legal scholar John Wigmore believed that permitting juries to nullify actually is essential to assure justice.⁷¹ He noted that law—which dictates general rules—and justice—which involves the fairness of the outcome in a particular case—occasionally conflict. Because law makers cannot anticipate every set of circumstances in every case, the jury must have the facility to ignore a general rule of law if doing so is necessary to achieving justice in an individual case.⁷²

Additionally, juries should be allowed to nullify when laws are unjust and oppressive—either because they were enacted out of design or because community values have changed faster than the laws.⁷³ The failure to give a nullification instruction arguably could lead to injustice—particularly when the jury would have acquitted if it had been informed of its power to do so. An example of such an “empathy” case might occur in prosecution for statutory rape when the accused himself is young or when the

⁶⁸Schefflin & Van Dyke, *supra* note 21, at 106.

⁶⁹*Id.*

⁷⁰HANS & VIDMAR, *supra* note 17, at 157 (1986); *cf.* Ballew v. Georgia, 435 U.S. 223, 229 (1978) (purpose of jury is to provide defendant with a safeguard against the corrupt or overzealous prosecutor and against the complacent, biased, or eccentric judge, which is attained through the participation of jurors, as representatives of the community, applying the common sense of laymen); Beckwith v. State, 386 So.2d 836, 841 (Fla. App. 1980) (that conscience of community may affect verdict is no aberration; it is the constitutional scheme).

⁷¹HANS & VIDMAR, *supra* note 17, at 155; *cf.* United States v. Moylan, 417 F.2d 1002, 1006 (4th Cir. 1969), *cert. denied*, 397 U.S. 910 (1970) (“concededly, this power of the jury [to nullify] is not always contrary to the interests of justice”); United States v. Simpson, 460 F.2d 515, 519 (9th Cir. 1972) (“We acknowledge the truth that all such verdicts ... cannot reasonably be said to have been undesirable”); United States v. Anderson, 716 F.2d 446, 450 (7th Cir. 1983) (“natural and at times desirable aberration”); United States v. Desmond, 670 F.2d 414, 417 (3d Cir. 1982) (“beneficial role in acting as a ‘safety valve’”).

⁷²*Id.*

⁷³*Id.*

complainant, although under the statutory age of consent, is not young in either terms of appearance or experience.⁷⁴ In particular, because the *Manual for Courts-Martial (Manual)* dictates that the accused cannot claim as a defense to statutory rape that the sex was consensual, that the accused was unaware or misinformed of the female's true age, or that she was of prior unchaste character, this so-called "empathy case" scenario easily could arise.⁷⁵

The failure to instruct jurors on their power to nullify also raises constitutional concerns. The right to a jury actually exists as part of a constitutional framework designed to protect defendants from potential government abuse.⁷⁶ The Sixth Amendment states, "In all criminal prosecutions, the accused shall enjoy the right to a ... public trial by an impartial jury. ..." ⁷⁷ The Sixth Amendment right to a jury trial is "fundamental to the American scheme of justice," acting as a safeguard against the government.⁷⁸ This constitutional safeguard is achieved through the "participation of the community in determinations of guilt and by the application of the common sense of laymen who, as jurors, consider the case."⁷⁹

Some commentators argue that the jury's common-law prerogative to nullify not only gives the jury a concomitant constitutional right to nullify, but also imposes on the court a duty to inform a jury of that right. These commentators assert that when a jury convicts a defendant whom it would have acquitted had it been informed of its nullification right, the defendant's right to a jury trial has been violated. Consequently, the defendant has a Sixth Amendment right to a nullification instruction.⁸⁰

Alternatively, proponents of a jury nullification instruction urge that the defendant has a constitutional right to create an

⁷⁴Rembar, *supra* note 24, at 367.

⁷⁵MANUAL FOR COURTS-MARTIAL, United States, pt. IV, para. 45c(2) (1984) [hereinafter MCM].

⁷⁶Weinberg-Brodt, *supra* note 6, at 827; Ballew v. Georgia, 435 U.S. 223, 229 (1977).

⁷⁷U.S. CONST. amend. VI.

⁷⁸Ballew, 435 U.S. at 229 (citing Duncan v. Louisiana, 391 U.S. 145, 149 (1968)).

⁷⁹Ballew, 435 U.S. at 229 (citing Williams v. Florida, 399 U.S. 78, 100 (1970)).

⁸⁰Weinberg-Brodt, *supra* note 6, at 840 & n.87-89 (citing L. VELVEL, UNDECLARED WAR AND CIVIL DISOBEDIENCE 218-19 (1970); Schefflin, *Jury Nullification: The Right To Say No*, 45 Cal. L. Rev. 168, 219 (1972)). *But see* United States v. Drefke, 707 F.2d 978, 982 (8th Cir. 1983) (rejecting, without explanation, Sixth Amendment argument).

“opportunity” for jury nullification through an instruction because the Sixth Amendment right to a jury trial incorporates all the powers of a jury, including illegitimate ones. Consequently, even though the jury only has the power—but not the right—to nullify, defendants retain the right, derived from the jury’s nullification power, to have the jury informed of its power.⁸¹

One legal commentator also has advanced an equal protection argument in support of a jury nullification instruction,⁸² basing this argument on the premise that defendants will benefit or suffer randomly, depending upon whether or not their jurors are aware of the power to nullify.⁸³ This argument holds as follows:

[I]f the legal system really does recognize justified rule departures by juries, then a defendant is entitled to have the jury instructed on the subject. Otherwise, his fate depends upon whether the jury chosen to hear the case happens to be sufficiently cantankerous ... to disregard what the judge tells them [N]othing so chancy can be called legitimate; the stakes are too high to resort to a lottery.⁸⁴

IV. Opposition to a Nullification Instruction

Critics of jury nullification instructions offer several arguments in opposition to informing the jury of its power to nullify. Some critics argue that such an instruction would lead to “chaos and lawlessness.”⁸⁵ Free to disregard the law, juries would

⁸¹Weinberg-Brodt, *supra* note 6, at 840 (citing Schefflin, *supra* note 80, at 219 (“if the argument that the *jury* has no *right* to nullify, even though they clearly have the *power* to do so, is found to be correct, ... then, one can derive from the sixth amendment the *defendant’s right* to the chance for jury acquittal [I]f the defendant has a constitutional right to a chance of jury acquittal, the jury should be told about it”)); Schefflin & Van Dyke, *supra* note 21, at 54.

“Christie, *Lawful Departures From Legal Rules: “Jury Nullification” and Legitimated Disobedience*, 62 CAL. L. REV. 1289, 1303 (1974), cited in Weinberg-Brodt, *supra* note 6, at 840 n.91.

⁸³*But cf.* United States v. Gorham, 523 F.2d 1088, 1098 (D.C. Cir. 1975) (“The right to equal justice under law inures to the public as well as to individual parties to specific litigation, and that right is debased when juries at their caprice ignore the dictates of established precedent and procedure”).

⁸⁴*Id.*

⁸⁵*Courtroom Putsch?*, *supra* note 5, at 4, col. 2; see also Sparf and Hansen, 156 U.S. at 101 (public and private safety would be in peril); United States v. Krzyske, 836 F.2d 1013, 1021 (6th Cir. 1988) (undermine the impartial determination of justice based on law); United States v. Anderson, 716 F.2d 446, 450 (7th Cir. 1983) (“too great a threat to the rule of law”); United States v. Drefke, 707 F.2d 978, 982 (8th Cir. 1983) (invite chaos); United States v. Dougherty, 473 F.2d 1113, 1133 (D.C. Cir. 1972) (anarchy); United States v.

convict or acquit on the basis of race, ethnicity, religion or merely on whim.⁸⁶ Unbridled juries could, in effect, legally sanction bias crimes, undermine the tax system by allowing tax cheats to go free,⁸⁷ condone vigilantism, and thwart the will of the elected legislature.⁸⁸ Although jury nullification proponents argue in terms of acquittal, a jury possesses the potential of exhibiting a darker side; juries just as easily can convict an innocent defendant unlawfully as they mercifully can acquit a guilty one.⁸⁹ Similarly, if applied to civil trials, jury nullification could wreak havoc with commercial transactions.⁹⁰

In *United States v. Gorham*⁹¹ the District of Columbia Circuit cautioned that a jury nullification instruction could undermine the very basis of our legal system and deny equal justice to the parties in litigation.⁹² The court held, "The right to equal justice under law inures to the public as well as to the individual parties to specific litigation, and that right is debased when juries at their caprice ignore the dictates of established precedent and procedure."⁹³

Permitting jury nullification, critics also argue, would erode the sense of responsibility of the individual juror.⁹⁴ Jurors can defend themselves against societal censure for unpopular, but correct, decisions by rationalizing to friends and neighbors that they merely were following the instructions of the court.⁹⁵

Simpson, 460 F.2d 515, 519 (9th Cir. 1972) (attack upon law itself); *United States v. Moylan*, 417 F.2d 1002, 1006 (4th Cir. 1969), *cert. denied*, 397 U.S. 910 (1970) ("negating the rule of law in favor of the rule of lawlessness"); *United States v. Wiley*, 503 F.2d 106, 107 (8th Cir. 1974) (citing *Moylan*); *Ballard v. Uribe*, 715 P.2d 624, 647 (Cal. 1986) (Bird, C.J., concurring & dissenting) (anarchy); *People v. Partner*, 225 Cal. Rptr. 502, 506 (Cal. App. 2d Dist. 1986).

⁸⁶*Courtroom Putsch?*, *supra* note 5, at 4, col. 2. Nullification proponents, however, counter that a nullification instruction actually would discourage acquittals based on prejudice because the instruction would use justice and conscience—rather than individual bias—as the standards for acquittal. Schefflin & Van Dyke, *supra* note 21 at 107.

⁸⁷*Cf. United States v. Powell*, 955 F.2d 1206 (9th Cir. 1991) (instruction refused in tax evasion case); *United States v. Drefke*, 707 F.2d 978 (8th Cir. 1983) (failing to file income tax returns); *United States v. Buttorff*, 572 F.2d 619, 627 (8th Cir. 1978) (aiding and abetting in the filing of false income tax-related forms); *United States v. Wiley*, 503 F.2d 106 (8th Cir. 1974) (willful failure to file income tax return); *United States v. Krzske*, 836 F.2d 1013 (6th Cir. 1988) (tax evasion and failure to file income tax returns).

⁸⁹*Rembar*, *supra* note 24, at 368.

⁹⁰*Id.*; *Ballard v. Uribe*, 715 P.2d 624, 647 (Cal. 1986) (Bird, C.J., concurring and dissenting) (jury nullification has no place in a civil trial).

⁹¹523 F.2d 1088 (D.C. Cir. 1975).

⁹²*Id.* at 1098.

⁹³*Id.*

⁹⁴*Schefflin & Van Dyke*, *supra* note 21, at 85.

⁹⁵*Id.* at 108.

Some critics believe that the power to nullify is a jury option that is better left unsaid.⁹⁶ Proponents of this argument recognize the *power* of the jury to nullify, but question whether the jury has a *right* to do so and be instructed in that regard.⁹⁷ By not instructing the jury of its nullification power, the court can ensure that jurors will use that power sparingly and depart from the mandates of the law only in instances of great injustice or when their consciences override the judge's instructions.⁹⁸ As one court has stated,

[I]t is pragmatically useful to structure instructions in such ways that the jury must feel strongly about the values involved in the case, so strongly that it must itself identify the case as establishing a call of high conscience, and must independently initiate and undertake an act in contravention of the established instructions. This requirement of independent jury conception confines the happening of the lawless jury to the occasional instance that does not violate, and viewed as an exception may even enhance, the over-all normative effect of the rule of law.⁹⁹

In *United States v. Washington*,¹⁰⁰ the District of Columbia Circuit held that while a jury has the power to ignore the law, it does not have the right to do so. The jury "has no more 'right' to find a 'guilty' defendant 'not guilty' than it has to find a 'not guilty' defendant 'guilty,' and the fact that the former cannot be corrected by a court, while the latter can be, does not create a right out of the power to misapply the law."¹⁰¹ Regardless of this

⁹⁶*Id.*; see also *People v. Partner*, 225 Cal. Rptr. 502, 506 (Cal. App. 2d Dist. 1986) ("this power should not be legitimized in instructions to the jury").

⁹⁷*Schefflin & Van Dyke, supra* note 21, at 98. *United States v. Trujillo*, 714 F.2d 102, 105 (11th Cir. 1983) (jury has power to nullify, but its duty is to apply the law as interpreted and instructed by the courts); cf. *Commonwealth v. Fernelte*, 500 N.E.2d 1290, 1298 n.23 (Mass. 1986) (recognizing power to nullify, but rejecting premise that jurors have a right to nullify or that judge must inform them of their powers); *People v. Partner*, 225 Cal. Rptr. 502, 506 (jury has power, but *only* has the right to find the facts and apply them to the law); *Lee v. State*, 743 P.2d 296, 300 (Wyo. 1987) (jury nullification is not a "right" of the defendant). Jurors who indicate during voir dire that they are unwilling or unable to follow the law, may be excluded from the panel. *Poyner v. Commonwealth*, 329 S.E.2d 815, 825 (Va. 1985).

⁹⁸*Schefflin & Van Dyke, supra* note 21, at 100; *Rembar, supra* note 22, at 369; cf. *United States v. Boardman*, 419 F.2d 110, 116 (5th Cir. 1969) (preserve the existing balance between judge and jury).

⁹⁹*United States v. Dougherty*, 473 F.2d 1113, 1134 (D.C. Cir. 1972) (jury acts as a "safety valve" for exceptional cases, without being a runaway institution).

¹⁰⁰705 F.2d 489 (D.C. Cir. 1983).

¹⁰¹*Washington*, 705 F.2d at 494; see also *United States v. Childress*, 746 F. Supp. 1122, 1140 (D.D.C. 1990); *Commonwealth v. Fernelte*, 500 N.E.2d 1290, 1298 n.23 (Mass. 1986) (no right to nullify).

power, the jury's duty is to "apply the law as interpreted and instructed by the court."¹⁰² Additionally, in *United States v. Sloan*,¹⁰³ an Indiana federal district court held that the power to disregard the law and acquit belongs to the jury, but is not a right belonging to the defendant.¹⁰⁴

V. Proposed Instruction

While an accused has no right to a nullification instruction, a judge appears to possess the discretion in exceptional cases to permit such an instruction.¹⁰⁵ Further, the Manual for Courts-Martial contains no specific prohibition against a nullification instruction.

The Manual provides that the military judge shall "instruct the members on questions of law and procedure which may arise"¹⁰⁶ and is permitted to give preliminary instructions prior to presentation of the case on the merits "as may be appropriate."¹⁰⁷ Further, the military judge is directed to give members appropriate instructions on findings after argument by counsel and before the members close to deliberate on findings.¹⁰⁸ Required findings instructions include "other explanations, descriptions, or directions as may be necessary and which are properly requested by a party or which the military judge determines, sua sponte, should be given."¹⁰⁹ Counsel always retain their prerogatives of proposing new instructions to the military judge.¹¹⁰

While nullification is not technically a "defense," it is clearly part of the existing "law," and counsel may request the military judge to instruct the panel members regarding this particular aspect of the law. In deciding whether to give such an instruction, the military judge's discretion may not be without limits.¹¹¹ The

¹⁰² Schefflin & Van Dyke, *supra* note 21, at 105.

¹⁰³ 704 F. Supp. 880 (N.D. Ind. 1989).

¹⁰⁴ *Id.* at 884; *cf.* *United States v. Sawyers*, 423 F.2d 1335, 1341 (4th Cir. 1970) (no "right" to an irrational verdict).

¹⁰⁵ *Cf.* Warren & Jewell, *Instructions And Advocacy*, 126 MIL. L. REV. 147, 150 (1989) ("military judge has substantial discretion in this area").

¹⁰⁶ MCM, *supra* note 75, R.C.M. 801(a)(5).

¹⁰⁷ *Id.* R.C.M. 913(a).

¹⁰⁸ *Id.* R.C.M. 920(a), (b).

¹⁰⁹ *Id.* R.C.M. 920(e).

¹¹⁰ Warren & Jewell, *supra* note 105, at 149 (citing *United States v. Rowe*, 11 M.J. 11 (C.M.A. 1981)).

¹¹¹ *United States v. Dubose*, 19 M.J. 877, 879 (A.F.C.M.R. 1985), *petition denied*, 21 M.J. 147 (C.M.A. 1985). The only practical means by which a trial counsel may challenge the military judge's election to give such an instruction is through an Article 62 interlocutory appeal. A nullification instruction likely would

Air Force Court of Military Review has held that a proposed instruction must be evaluated within the confines of a three-part test: (1) whether the issue reasonably is raised by the evidence; (2) whether the requested instruction adequately is covered elsewhere in the instructions; and (3) whether the requested instruction accurately states the law.¹¹² Clearly, the second and third prongs of the test are satisfied if the instruction conforms to existing nullification case law.

The proper test to determine whether the first prong of a proposed nullification instruction is satisfied—or even applicable—is unclear. The Air Force Court of Military Review apparently did not consider nullification instructions when it formulated its three-part test. If the test, or this portion of it, is to be used at all when determining the appropriateness of a nullification instruction, then the first part of the test could be applied to gauge whether the evidence has shown that the instant case qualifies as the “exceptional” case that justifies a nullification instruction.

Currently, the military judge instructs the panel prior to argument as follows:

Members of the court, at this time I will instruct you on the law to be applied in this case. When you close to deliberate and vote on the findings, each of you must resolve the ultimate question of whether the accused is guilty or not guilty based upon the evidence presented here in court and the instruction which I will give you. It is my duty to instruct you on the law. It is your duty to determine the facts, apply the law to the facts, and, thus, determine the guilt or innocence of the accused, bearing in mind, again, that the law presumes the accused to be innocent of the charge(s) against him/her.¹¹³

If the military judge elects to instruct the panel on its nullification power, the following instruction is proposed:

not satisfy the basic threshold of “terminat[ing] the proceedings ... or ... exclud[ing] evidence that is substantial proof of a fact material in the proceeding.” UCMJ art. 62(a)(1) (1988). Arguably, an instruction that informs the members that they may disregard the evidence and acquit has the effect of excluding evidence and, therefore, may be the proper basis for an interlocutory appeal. *Cf.* *United States v. True*, 28 M.J. 1, 3 (C.M.A. 1989) (“focus on effect of the ruling”) (citations omitted).

“*United States v. Hanson*, 30 M.J. 1198, 1201 (A.F.C.M.R. 1990); *Dubose*, 19 M.J. at 879; *Warren & Jewell*, *supra* note 105, at 150.

¹¹³ *DEPT OF ARMY, PAM 27-9, MILITARY JUDGES’ BENCHMARK*, para. 2-28 (1 May 1982).

To reach a verdict that you believe is just, each of you may consider the evidence presented, your own common sense, your knowledge of human nature, and the ways of the world. If you determine that the accused has committed an offense, but you cannot in good conscious support a guilty verdict, you cannot be required to do so. However, you should exercise with great caution your power to acquit an accused who you believe has committed an offense.

VI. Argument by Counsel

In the 1735 seditious libel trial of John Zenger, Andrew Hamilton, Zenger's defense counsel, passionately appealed to the colonial jury to ignore the judge's instructions and disregard the existing British law.¹¹⁴ Hamilton urged the jury "to make use of their consciences and understanding in judging of the lives, liberties, or estates of their fellow subjects."¹¹⁵ Although Zenger was clearly guilty, the jury received the judge's instructions, withdrew to deliberate, and quickly returned to declare Zenger "Not Guilty."

Modern courts, however, also have been hesitant to allow defense counsel to argue jury nullification.¹¹⁶ These courts believe that counsel should not be permitted to encourage the jury members to violate their oaths by ignoring the court's instructions and applying the law at their will.¹¹⁷ Many believe that these arguments would pose a substantial threat to the rule of law.¹¹⁸

Mere semantics often will determine whether or not a nullification argument actually is permissible. In practice, a court's exercise of discretion over the scope of argument effectively is a matter of limiting the form or manner in which a

¹¹⁴Weinberg-Brodth, *supra* note 6, at 830-31 & n.31.

¹¹⁵United States v. Moylan, 417 F.2d 1002, 1006 (4th Cir. 1969), cert. denied, 397 U.S. 910 (1970) (citing ALEXANDER, A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENCER 93 (1963)).

¹¹⁶See United States v. Trujillo, 714 F.2d 102, 106 (11th Cir. 1983); United States v. Dougherty, 473 F.2d 1113, 1139 (D.C. Cir. 1972); United States v. Childress, 746 F. Supp. 1122, 1140 (D.D.C. 1990); United States v. Renfroe, 634 F. Supp. 1536, 1548-50 (W.D. Pa. 1986); State v. Pease, 740 P.2d 659 (Mont. 1987). But see United States v. Krzyske, 836 F.2d 1013, 1021 (6th Cir. 1988) (district court permitted counsel to argue jury nullification).

¹¹⁷United States v. Trujillo, 714 F.2d 102, 106 (11th Cir. 1983). Arguing the law to the jury, an attorney is limited to principles that later will be incorporated and charged to the jury. *Id.* (citing United States v. Sawyer, 443 F.2d 712, 714 & n.11 (D.C. Cir. 1971); United States v. Renfroe, 634 F. Supp. 1536, 1548-50 (W.D. Pa. 1986)).

¹¹⁸United States v. Sloan, 704 F. Supp. 880, 884 (N.D. Ind. 1989).

party delivers an otherwise improper argument.¹¹⁹ For example, an attorney may not express his or her personal opinion as to the credibility of witnesses or other matters at issue;¹²⁰ counsel, however, certainly is entitled to argue not only the evidence, but also any conclusions that a jury reasonably could infer from that evidence.¹²¹ Accordingly, an attorney's argument, "I believe X," would be improper, while the argument, "The evidence shows X," presumably would not be objectionable.¹²²

In nullification cases in which the defense counsel is prohibited from directly asking the jury to acquit in spite of the law, or from explaining the jury's power to nullify, counsel still may highlight the inequities of the case, enhance the image of the accused, and frame an argument that attempts to oblige the jury to vote for acquittal.¹²³ Counsel properly may argue the harshness, oppressiveness, and effect of the statutory penalty for a crime.¹²⁴ Only when an attorney takes the final step of directly asking the jury to disregard the law and to acquit, however, does he or she violate the prohibition against nullification argument.¹²⁵

In *United States v. Renfro*,¹²⁶ a federal district court held that jury nullification argument was impermissible, citing in part, to the American Bar Association Standards for Criminal Justice (ABA Standards).¹²⁷ The court opined that such argument was not otherwise justified by the attorney's obligation to represent his or her client zealously.¹²⁸

¹¹⁹3 HOFF & JUREK, FEDERAL LITIGATION GUIDE § 36.05, at 36-26 (1989).

¹²⁰*Id.* at 36-28; *see also* *United States v. Rodriguez-Estrada*, 877 F.2d 153, 158 (1st Cir. 1989) (injecting personal belief into summation and calling witness a liar held improper); *United States v. Fuentes*, 18 M.J. 41, 52 (C.M.A. 1984); *United States v. Clifton*, 15 M.J. 26, 30 n.5 (C.M.A. 1983); *United States v. Zeigler*, 14 M.J. 860 (A.C.M.R. 1982).

¹²¹3 HOFF & JUREK, *supra* note 121, at 36-28 to 36-29 (citing MODEL CODE OF PROFESSIONAL RESPONSIBILITY, DR 7-106(C)(4)); *see* *United States v. Johns*, 734 F.2d 657, 663 (11th Cir. 1984) (can argue inferences from the evidence); *United States v. Horn*, 9 M.J. 429, 430 (C.M.A. 1980) (same); *United States v. Doctor*, 21 C.M.R. 252 (C.M.A. 1956); *see also* 75A AM. JUR. 2D *Trial* § 632, at 233-34 (1991) (during closing argument, counsel may argue any inferences from the evidence and is given great latitude in drawing reasonable inferences).

¹²²3 HOFF & JUREK, *supra* note 121, at 36-29; *see also* *Horn*, 9 M.J. at 430.

¹²³*Smythers*, *supra* note 11, at 11.

¹²⁴75A AM. JUR. 2D *Trial* § 643, at 251 & n.55 (1991).

¹²⁵*Cf.* 3 HOFF & JUREK, *supra* note 121, at 36-27 to 36-28.

¹²⁶634 F. Supp. 1536 (W.D. Pa.), *aff'd*, 806 F.2d 254 (3d Cir. 1986) (holding defense counsel in contempt).

¹²⁷*Id.* at 1550.

¹²⁸*Id.* ("The zeal which an attorney owes to his client in no way justifies that tactic").

The ABA Standards were promulgated as useful "guidelines"¹²⁹ and, unless inconsistent with court-martial practice, the ABA Standards apply to military defense counsel.¹³⁰ The applicable section states,

A lawyer should refrain from argument which would divert the jury from its duty to decide the case on the evidence by injecting issues broader than the guilt or innocence of the accused under the controlling law or by making predictions of the consequences of the jury's verdict.

The *Renfro* court's reliance on ABA standard 4.78(d) to deny nullification argument may have exceeded the intent of this guideline. The commentary to the standard makes no specific reference to nullification; it speaks instead to the prohibition against arguing the political or social implications of the case.¹³¹ The commentary actually uses the example of a prosecutor improperly arguing for a conviction by referring to widespread crime in the community.¹³²

The court's decision in *Renfro* raises more questions than it answers. If, as one court believes, the power of the jury to nullify is a matter of common knowledge,¹³³ then counsel's argument on jury nullification apparently would be permissible on that basis.¹³⁴ Furthermore, if the power of nullification not only is common knowledge, but also is a part of American law, then counsel should be able to argue all of the "law" to a jury—not just discuss the law relating to the court's instructions as applied to

¹²⁹United States v. Young, 470 U.S. 1, 8 (1984); Willison v. Warden, Green Bay Corrections Inst., 657 F. Supp. 259, 266 (E.D. Wis. 1987).

¹³⁰TJAGSA Practice Note, *Defense Counsel: An Ethical Duty to Investigate*, ARMY LAW., July 1991, at 23 (citing DEP'T OF ARMY, REG. 27-10, LEGAL SERVICES: MILITARY JUSTICE, para. 5-8 (22 Dec. 1989); United States v. Roberts, 20 M.J. 689, 692-93 (A.C.M.R. 1985); United States v. Rhea, 29 M.J. 991, 995 (A.F.C.M.R. 1990) (citing DEP'T OF AIR FORCE, REG. 111-1, MILITARY JUSTICE GUIDE, para. 1-8 (30 Sept. 1988); cf. United States v. Brunson, 15 M.J. 898, 901 (C.G.C.M.R. 1982) (applied to Coast Guard officer acting as Article 32 investigating officer).

¹³¹STANDARDS OF CRIMINAL JUSTICE, Standard 4-7.8, Commentary, at 4.100 (1980).

¹³²*Id.*

¹³³*Dougherty*, 473 F.2d at 1135.

¹³⁴Counsel may argue facts that are common knowledge. See *Brooks v. Kemp*, 762 F.2d 1383, 1408 (11th Cir. 1985); *Tenorio v. United States*, 390 F.2d 96, 99 (9th Cir.), *cert. denied*, 393 U.S. 874 (1968); *United States v. Jones*, 11 M.J. 829, 832 (A.F.C.M.R. 1980) (historical facts and news items); see also 75A AM. JUR. 2D, *Trial* § 612, at 210 (1991) (proper for counsel to argue matters of common knowledge and to refer, by way of illustration, to well-known facts in history and the public press).

the facts of the case.¹³⁵ Finally, a restriction on counsel's argument, as a practical matter, necessarily limits the form or manner in which an otherwise improper argument can be made.¹³⁶ Accordingly, an overly stringent restriction on the form or manner of argument—such as a limit on argument pertaining to jury nullification—apparently would violate the defendant's right to put on a full defense.¹³⁷

VII. Conclusion

As the conscience of the community, the jury occupies a special place in the American judicial system. The members of this deliberative body do not sit as “mere factfinding machines.”¹³⁸ Rather, they function collectively in the historic role of the protector of an accused's rights, injecting the conscience and mores of the community into determinations of guilt or innocence.¹³⁹ This jury function is no aberration; it possesses constitutional overtones¹⁴⁰ and is an entrenched part of the American system of justice.

That a jury has the “power” to acquit, despite overwhelming evidence of guilt, is not subject to question. Instead, the debate in the legal community on this subject has centered over the defendant's right to inform the jury of this power, either by argument of counsel or through instruction from the bench. For a myriad of reasons, the courts have generally prevented this information from reaching the jury. Nevertheless, regardless of whether or not it is so instructed, the jury often knows that it has the prerogative to disregard the judge's formal instruction.

Opposition to the practice of informing a jury of its power to acquit “in the teeth of both law and facts” is based largely on a distrust of the jury system. Unlike their civilian counterparts, however, military panel members are chosen on the basis “of age, education, training, experience, length of service, and judicial

¹³⁵3 HOFF & JUREK, *supra* note 121, at 26-30 (limited to law included in judge's instructions) (citing *Baron Tube Co. v. Transport Insur. Co.*, 365 F.2d 858, 861 (5th Cir. 1966)); 75A AM. JUR. 2D, *Trial* § 641, at 246-47 (1991) (counsel's closing argument generally must conform to instructions that the court has indicated it will give; counsel **has no** right to argue a legal contention that the court has rejected).

¹³⁶*Cf.* 3 HOFF & JUREK, *supra* note 121, at 36-26.

¹³⁷*Cf. In re Oliver*, 333 U.S. 257, 273 (1948) (procedural due process requires that the defendant be allowed to present a full defense).

¹³⁸*Beckwith v. State*, 386 So.2d 836, 841 (Fla. App. 1980).

¹³⁹*Id.*

¹⁴⁰*Id.*

temperament,"¹⁴¹ and presumably would be less inclined whimsically to disregard the strict confines of a narrowly tailored jury nullification instruction.

While courts, as a general rule, properly prohibit argument on the jury's power to nullify, a per se prohibition actually does not exist. The trial judge still retains the discretion to allow both nullification instruction and argument and, in certain exceptional cases, the trial judge should exercise that discretion.

This article should not be perceived as a general call for permitting unrestricted nullification instruction and argument. Nevertheless, giving judges the facility to render a jury nullification instruction, and providing counsel the opportunity to make a jury nullification argument, should not be foreclosed completely. Doing otherwise may allow the general dictates of the law to overshadow the rendition of justice.

¹⁴¹United States v. Newson, 29 M.J. 17, 20 (C.M.A.1989) (citing UCMJ art. 25(d)(2) (1988)); United States v. Yager, 2 M.J. 484, 486 (A.C.M.R.1975).

THE TWENTY-FIFTH ANNIVERSARY OF MY LAI: A TIME TO INCUPLICATE THE LESSONS

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I. Introduction

The way of the superior man is like that of the archer. When he misses the center of the target he turns and seeks the cause of his failure in himself.¹

If history teaches anything about avoiding the mistakes and disasters of the past, it is that humanity first must understand historical lessons—lessons often understood only after the expenditure of incredible amounts of human blood and treasure—and then must inculcate those lessons in the members of each of its succeeding generations.

As America passes the second anniversary of its victory in the Persian Gulf War,² correctly having heeded the lessons of appeasement from World War II,³ another reminder of critical historical lessons is rapidly approaching. Spring 1993 marks the twenty-fifth anniversary of the My Lai massacre—an appropriate time to revisit the event and to reinforce the lessons learned.

Representing the antithesis of the conduct of United States Armed Forces during the Liberation and Defense of Kuwait, the My Lai massacre was a nightmarish event that most Americans would like to forget. Nevertheless, My Lai never must be forgotten. Its horror and disgrace are precisely why My Lai must never be erased from the individual memories of American citizens, nor must it ever be lost from the legacy of the United States. To the contrary, nothing provides a greater vehicle for inculcating the

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¹CONFUCIUS, THE ANALECTS OF CONFUCIUS 59 (Arthur Waley trans., 1939).

²See Michael Cramer, *Kuwait: Back to the Past*, TIME, Aug. 5, 1991, at 33. The ground phase of the military campaign in the Persian Gulf War lasted only 100 hours, from 24 to 28 February 1991. For an excellent overview of the entire operation, see *The Gulf War*, MIL. REV., Sept. 1991.

³See THE NATIONAL MILITARY STRATEGY OF THE UNITED STATES 6 (Jan. 1992).

necessity for strict adherence to the law of war than the lessons from the massacre at My Lai. From its engagements in Grenada in 1983, to Panama in 1989, to Kuwait in 1991, the United States military can take full credit for its commendable record in adhering to the law of war largely because of its commitment to institutionalizing the lessons learned from My Lai. Accordingly, every American soldier must understand the significance of the My Lai massacre and steadfastly must keep it in the forefront of his or her conscious.

11. The Massacre at My Lai

A. An Emblem of Shame

Every army has its own mythology, its symbols of heroism, and its symbols of shame. The Army of the United States is no exception. In the sphere of heroism, the American military has an incredible reservoir of noble and fantastic figures to draw from—men whose military proficiency and ethical conduct in combat have maintained an impeccable American reputation for both battlefield excellence and strict adherence to the laws regulating warfare.⁴ More than any other army in modern history, the American Army is able to claim proudly as its own some of the greatest soldiers in the history of warfare.

Unfortunately, the United States military also has its figures of shame, soldiers who have engaged in blatant violations of the most fundamental and civilized rules regulating behavior in combat.⁵ While American misconduct is certainly an aberration and not the norm, that does not lessen the severity of the shame. Without question, each and every grave breach⁶ of the law of war represents a horrible scar on the credibility of the American military, as well as the civilized democracy it protects.

In this context, the greatest emblem of American military shame in the twentieth century occurred during the Vietnam War—a war few Americans yet understand.⁷ While American troops were involved in several cases of unlawful killings of

⁴Jeffrey F. Addicott, *Operation Desert Storm, R.E. Lee or W.T. Sherman?* 136 MIL. L. REV. 115 (1992) (arguing that General R. E. Lee set such a standard for the United States military).

⁵*Id.* (pointing out the war crimes of General William T. Sherman during the Civil War).

⁶See *infra* note 44 and accompanying text.

⁷See, e.g., THE VIETNAM DEBATE (John Norton Moore ed., 1990); JOHN NORTON MOORE, LAW AND THE INDO-CHINA WAR (1972). An entire series of myths has persisted over the Vietnam War. These myths commonly have covered issues such as the lawfulness of the American intervention, the nature and purpose of the Communist Party in North Vietnam, and the reasons for the failure of the United States to carry the war into North Vietnam to win a military victory.

unarmed civilians during the Indo-China War, by far the most violent—and hence the most infamous—of these incidents has come to be called the My Lai massacre.

Any discussion of the American violations of the law of war during Vietnam in general, and at My Lai in particular, must be viewed against the background of the enemy's activities. In this context, American violations absolutely pale in comparison to the many thousands of command-directed slaughters that were committed by the communist regime of North Vietnam. Accordingly, though the incident was not atypical of the war in general, the My Lai massacre certainly can be characterized as an aberration with respect to the American presence in Vietnam.

The American record in Vietnam with regard to observance of the law of war is not a succession of war crimes and does not support charges of a systematic and willful violation of existing agreements for standards of human decency in time of war, as many critics of the American involvement have alleged. Such charges were based on a distorted picture of the actual battlefield situation, on ignorance of existing rules of engagement, and on a tendency to construe every mistake of judgement as a wanton breach of the law of war.⁸

In contrast, blatant violations of numerous provisions of the law of war—including murder, torture, and intimidation—were the *modus operandi* for the Viet Cong and North Vietnamese Army.⁹ In one scholar's estimate, North Vietnam sponsored the slaughter of over one and a quarter million of its own people from 1945 to 1987.¹⁰ Included in this figure, since the fall of South Vietnam in 1975, are over 250,000 Vietnamese "boat people" as well as 250,000 other civilians who either were slaughtered ruthlessly outright or perished in communist death camps created to "re-educate" noncommunists.¹¹ These massive crimes never have been punished, much less acknowledged forcefully by human rights groups. "In sum, re-education was a label for revenge, punishment, and social prophylaxes. But unlike the Khmer Rouge who were too public about their mass killing, the Vietnamese regime cleverly and at first hid it from the outside world."¹²

⁸R.J. RUMMEL, DEATH BY GOVERNMENT: GENOCIDE AND MASS MURDER IN THE TWENTIETH CENTURY (forthcoming 1993) (manuscript at 31, on *file* with author).

⁹See *infra* note 52 and accompanying text.

¹⁰RUMMEL, *supra* note 8, manuscript at 1.

¹¹*Id.* at 48-52.

¹²*Id.* at 46.

The enemy's barbaric conduct should offer little solace to the American conscience in the wake of My Lai. The record of misconduct amassed by the communists in no way justifies what occurred at My Lai; nevertheless, it helps to place the American violations in a real-world perspective. For North Vietnam, the strategy for a communist victory intentionally was predicated on terror and propaganda; for the United States, the massacre at My Lai was an unfortunate contradiction.

B. The Facts of My Lai

The hard facts relating to the My Lai massacre are now fairly certain, thanks to a thorough criminal investigation aimed at the perpetrators of the crime and a collateral administrative investigation ordered by the Secretary of the Army and headed by Lieutenant General W. R. Peers.¹³ Despite an initial cover-up by some of those associated with the crime, the enormity of the atrocity diminished the likelihood that it long could be kept secret. Nevertheless, for well over a year, the general public knew nothing of the incident.¹⁴

On March 16, 1968, an American combat task force of the 23d Infantry Division (the Americal Division)¹⁵ launched an airmobile assault into the village complex of Son My in the province of Quang Ngai, South Vietnam. Like all such operations, the attack was executed only after the commander of the task force, Lieutenant Colonel Frank Barker, had assembled his key junior commanders for a final review of the details of the combat operation. This briefing, which took place on March 15, 1968, involved discussions on the positioning of helicopters, the conduct of artillery preparation, and the specific assignments of the three companies that comprised what became known as *Task Force "Barker."* While the other two companies provided blocking and support functions, Charlie Company, commanded by Captain

¹³WILLIAM R. PEERS, *THE MY LAI INQUIRY* (1979) [hereinafter PEERS REPORT]. The Secretary of the Army and the Chief of Staff, United States Army, issued a joint directive for Lieutenant General William R. Peers to explore the original Army investigations of what had occurred on March 16, 1968, in Son My Village, Quang Ngai Province, Republic of Vietnam. This investigation became known as the Peers Report. Specifically, General Peers was tasked to determine the following: (1) the adequacy of such investigations or inquiries and subsequent reviews and reports within the chain of command; and (2) whether any suppression or withholding of information by persons involved in the incident had taken place. See also JOSEPH GOLDSTEIN ET AL., *THE MY LAI MASSACRE AND ITS COVER-UP: BEYOND THE REACH OF LAW?* 29 (1976).

¹⁴For an excellent discussion of the initial breaking of the story see William Wilson, *I Prayed to God That This Thing Was Fiction . . .*, AMER. HERITAGE, Feb. 1990, at 44.

¹⁵*Id.* The troops making up the task force were from the 1st Battalion, 20th Infantry, 11th Light Infantry Brigade.

Ernest Medina, would take the primary responsibility for battling any enemy resistance encountered in the village.

At the briefing, Lieutenant Colonel Barker reminded his commanders that intelligence reports had indicated that the village complex was a staging area for the 48th Viet Cong local force battalion and that the Americans could expect an enemy force of up to 250 soldiers.¹⁶ Accordingly, the American soldiers anticipated that they would be outnumbered by the enemy. Still, having yet to engage any enemy forces in direct combat, *Task Force Barker* saw the operation as an opportunity finally to fight the ever-elusive Viet Cong in the open.¹⁷

The intelligence on a large enemy force, however, proved to be incorrect. When the American combat forces landed, they soon found that the village was occupied almost totally by noncombatants.¹⁸ Although the civilians offered no resistance whatsoever, some of the members of Charlie Company went on a command-directed killing spree. Under the direct supervision of several company grade officers—First Lieutenant William L. Calley, Jr., being the most notorious—American troops murdered well over 200 unarmed South Vietnamese civilians.¹⁹

The largest killing of civilians occurred in the hamlet of My Lai, known to the Americans by the nickname of “Pinkville,” which was part of the Son My complex. The murdered consisted primarily of women, children, and old men; some were shot in small groups, others were fired upon as they fled. At My Lai, most of the civilians methodically had been herded into groups and then gunned down. The largest group was killed under the direct supervision of Lieutenant Calley.²⁰

¹⁶PEERS REPORT, *supra* note 13, at 47. Total enemy strength in Quang Ngai Province in the spring of 1968 was thought to be between 10,000 and 14,000 men.

¹⁷GOLDSTEIN ET AL., *supra* note 13, at 492. The Son My area had been the scene of numerous incidents in which many Americans had been killed or wounded by booby traps and snipers during the few months prior to the My Lai incident. Charlie Company had lost two dead and 13 wounded in a minefield on February 25, 1968. On March 14, 1968, a popular sergeant had been killed and three other soldiers wounded, by a booby trap. In total, Charlie Company had lost 20 soldiers killed or wounded in the Son My area.

¹⁸*Id.* at 103. The *Peers Report* made the following finding on enemy combatants: “The evidence indicates that only three or four were confirmed as Viet Cong, although there were undoubtedly several unarmed Viet Cong men, women and children among them and many more active supporters and sympathizers” *Id.*

¹⁹Although the official count of the dead was 175, this figure was certainly low. The dead may have reached almost 400. *Id.* at 1, 314. *But see* George Esper, *Twenty Years Later, My Lai Remains a Symbol of Shame*, L. A. TIMES, Mar. 13, 1988, at 2A; RUMMEL, *supra* note 8, manuscript at 32 (putting the figure at 347). The current communist regime in Vietnam has erected a plaque in My Lai with the names of 540 men, women, and children listed as dying in the massacre.

²⁰*But see infra* note 31.

In addition to the unlawful killing of civilians, the soldiers destroyed most of the homes and killed most of the domestic animals in the village.²¹ Several cases of rape also were reported to have taken place during the massacre.²² When it was over, the statistics told the story: one American soldier in Charlie Company had been wounded by friendly fire²³ and hundreds of South Vietnamese women, children, and elderly men were dead.

Perhaps the only redeeming aspect of the incident was the fact that some of the American soldiers either had refused to participate²⁴ or openly had attempted to halt the killings. Chief Warrant Officer Hugh C. Thompson, Jr., was one of those who took specific actions to halt the killings. Tasked with piloting one of the helicopters during the operation, Chief Thompson testified that he noticed large numbers of "wounded and dead civilians everywhere."²⁵ Assuming that the Americans on the ground would assist those who were wounded, which was the standard procedure, Chief Thompson began to mark the location of the wounded Vietnamese civilians with smoke canisters as he flew overhead. To his horror, he witnessed the exact opposite. Drawn to the smoke, American soldiers were shooting the wounded that Chief Thompson had marked so accurately. Still only partially realizing the full impact of what was happening on the ground, Chief Thompson immediately headed his helicopter into My Lai, and landed near a large drainage ditch filled with dead and dying civilians. As he began to assist the Vietnamese who were still alive, Lieutenant Calley and a handful of troops approached.

When Chief Thompson asked for assistance in caring for the civilians, Lieutenant Calley clarified his intentions to kill the remaining noncombatants. Chief Thompson recalled that Lieutenant Calley said of the civilians, "The only way you'll get them out is with a hand grenade."²⁶ Instead of backing down from the clear

²¹See PEERS REPORT, *supra* note 13, at 277. The report from the Son My Village Chief, dated March 22, 1968, indicated that 90% of the animals and houses as destroyed.

²²See Esper, *supra* note 19; GOLDSTEIN ET AL., *supra* note 13, at 343. The Peers Report made the following specific findings in reference to one platoon leader, Lieutenant Steven K. Brooks: "Although he knew that a number of his men habitually raped Vietnamese women in villages during operations, on 16 March 1968, he observed, did not prevent, and failed to report several rapes by members of his platoon while in My Lai ... on 16 March."

²³See GOLDSTEIN ET AL., *supra* note 13, at 493. The single casualty probably was a self-inflicted gun shot wound by one of the members of Company C who was seeking to avoid participation in the operation.

²⁴See Wilson, *supra* note 14, at 49. One of the soldiers who had refused to participate was Sergeant Michael Bernhardt. Sergeant Bernhardt, however, did not attempt to halt his fellow soldiers from the killings. He stated, "It was point blank murder, and I was standing there watching it." *Id.*

²⁵*Id.* at 50.

²⁶*Id.*

designs of a superior officer, however, Chief Thompson quickly ordered his **M60** machine gunner, Private First Class Lawrence Colburn, to open fire on the United States soldiers if they came any closer to the remaining civilians. Chief Thompson then placed all the civilians he could on his helicopter and ferried them to safety.

C. My Lai Comes to Light

The initial attempts to cover up the crime could not quell the nightmares of those who had witnessed the slaughter. Rumors of the massacre persisted, coming to a boiling point when an ex-serviceman named Ron Ridenhour sent a second-hand account of the massacre to President Richard Nixon, "twenty three members of Congress, the Secretaries of State and Defense, the Secretary of the Army, and the Chairman of the Joint Chiefs of Staff."²⁷ Ridenhour had written a four-page letter that chronicled detailed information from several of the soldiers who either had taken part in the bloody massacre or had witnessed it first hand. The letter read in part as follows:

It was late in April, 1968 that I first heard of "Pinkville" [(My Lai)]. ... It was in the end of June, 1968 when I ran into Sargent [sic] Larry La Croix at the USO in Chu Lai. La Croix had been in 2nd Lt. Kally's [sic] platoon on the day Task Force Barker swept through "Pinkville." What he told me verified the stories of the others, but he also had something new to add. He had been a witness to Kally's [sic] gunning down of at least three separate groups of villagers. "It was terrible. They were slaughtering the villagers like so many sheep." Kally's [sic] men were dragging people out of bunkers and hootches and putting them together in a group. The people in the group were men, women and children of all ages. As soon as he felt that the group was big enough, Kally [sic] ordered an **M-60** (machine gun) set up and the people killed. La Croix said he bore witness to this procedure at least three times. ... This account of Sargent La Croix confirmed the rumors that Gruver, Terry and Doherty had previously told me about Lieutenant Kally [sic] I have considered sending this to newspapers, magazines, and broadcasting companies, but I somehow feel that investigation and action by the Congress of the United States is the appropriate procedure. ...²⁸

²⁷*Id.* at 46.

²⁸GOLDSTEIN ET AL., *supra* note 13, at 36.

Ron Ridenhour's letter received prompt attention both in the media and in the legislative and executive branches of the federal government. The initial military reaction was one of disbelief. No one believed that a massacre of that magnitude could have been committed by American soldiers or that the massacre "could have remained hidden for so long."²⁹

As the horrible truth of the crime came to light, however, the Army quickly launched the comprehensive Peers Commission investigation, popularly known as the Peers Report.³⁰ At the same time, the general public tasted the horror of the My Lai massacre through a series of gruesome photographs of the dead, which had been taken by a former Army photographer named Ronald Haeberle. The color photographs appeared in the December 1969 issue of *Life* magazine.

D. The Impact of My Lai

Charges were preferred against four officers³¹ and nine enlisted men³² for their involvements in the My Lai massacre. In

"PEERS REPORT *supra* note 13, at 7; *see also* GOLDSTEIN ET AL., *supra* note 13, at 274-75. The Army knew that the communists had reported the alleged killing of civilians at My Lai, but the reports largely were ignored, in keeping with the common communist technique of outrageous propaganda. One notice that was captured in late March 1968 was entitled "Concerning Crimes Committed by US Imperialists and Their Lackeys Who Killed More Than 500 Civilians at Tinh Khe Village (Son My), Son Tinh District." It stated the following:

Xam Lang (Thuan Yen) Subhamlet of Tu Cung Hamlet and Xom Go Subhamlet of Co Luy were pounded by artillery for hours. After shelling, nine helicopters landed troops who besieged the two small hamlets, killing and destroying. They formed themselves into three groups: one group was in charge of killing civilians, one group burned huts, and the third group destroyed vegetation and trees and killed animals. Wherever they went, civilians were killed, houses and vegetation were destroyed and cows, buffalo, chickens, and ducks were also killed. They even killed old people and children; pregnant women were raped and killed. This was by far the most barbaric killing in human history.

³⁰*See* PEERS REPORT, *supra* note 13; *supra* text accompanying note 13.

³¹Two other key officers involved in the massacre, Lieutenant Steven Brooks and Lieutenant Colonel Frank Barker, had been killed in Vietnam before the formal investigation into My Lai had begun. The *Peers Report* found that Lieutenant Brooks had "directed and supervised the men of his platoon in the systematic killing of at least 60-70 noncombatants in the subhamlets of My Lai and Binh Tay." The *Peers Report* also found that Colonel Barker had been involved in the cover-up of the massacre. *See* GOLDSTEIN ET AL., *supra* note 13, at 343. The officers charged with murder were Captain Ernest L. Medina, Captain Eugene M. Kotouc, First Lieutenant William L. Calley, Jr., and First Lieutenant Thomas K. Willingham. *See Peers Report, supra* note 13, at 227.

³²The enlisted men charged with murder were Sergeant Kenneth L. Hodges, Sergeant Charles E. Hutton, Sergeant David Mitchell, Sergeant Escquiel Torres, Specialist Four William F. Doherty, Specialist Four Robert W. T'Souvas, Corporal Kenneth Schiel, Private Max Hutson, and Private Gerald A. Smith. *See* PEERS REPORT, *supra* note 13, at 227.

addition, twelve other officers were charged with military offenses associated with the cover-up.³³ Of these twenty-five accused soldiers, only Lieutenant William Calley was convicted.³⁴ The other officers and enlisted men either successfully moved to have the charges against them dismissed or were found not guilty at their courts-martial.

Tried before a military panel composed of six officers, Lieutenant Calley was found guilty of the premeditated murder of twenty-two noncombatants and of assault with intent to murder a two-year-old child. Although Calley was sentenced to a dismissal and confinement at hard labor for life, the convening authority reduced this sentence to a dismissal and twenty years at hard labor. Subsequent to the convening authority's action, the Secretary of the Army further reduced the sentence to a dismissal and ten years at hard labor.³⁵

Aside from the issue of individual culpability for those involved in the massacre, My Lai had a devastating impact on the outcome of the Vietnam War. In particular, because the United States apparently had no grand strategy to win the war,³⁶ this one atrocity arguably did as much to harm the survival of an independent South Vietnam as any other single event during the Indo-China War. The public revelation of this massacre not only solidified the anti-war movement in the United States, but also cast a pall of confusion and shame over the nation at large. This aura contributed significantly to the eventual abandonment of South Vietnam to the communist forces in the North. Beginning in 1969, a vocal minority of war protesters incorporated the United States soldier into their opposition to the war. For many of these people, the enemy was now the American fighting man—not the communists.

³³These consisted of Major General Samuel W. Koster, Brigadier General George H. Young, Colonel Oran K. Henderson, Colonel Nels A. Parson, Lieutenant Colonel Robert B. Luper, Major Charles C. Calhoun, Major David C. Gavin, Major Robert W. McKnight, Major Frederic W. Watke, First Lieutenant Kenneth W. Boatman, and First Lieutenant Dennis H. Johnson. *See* PEERS REPORT, *supra* note 13, at 221-22.

³⁴United States v. Calley, 48 C.M.R. 19 (C.M.A. 1973).

³⁵William Calley, Jr., actually served a total of only three years under house arrest at Fort Benning, Georgia, and six months at the confinement facility at Fort Leavenworth, Kansas (from June 1974 to November 1974). Calley was released from confinement at Fort Leavenworth when his sentence was overturned by a federal district judge in Georgia. When the Fifth Circuit Court of Appeals reinstated the conviction, Calley was not returned to confinement; instead, he was paroled by the Secretary of The Army in 1975. He works today in his father-in-law's jewelry store in Columbus, Georgia. *See* Wilson *supra* note 14, at 53.

³⁶*See infra* text accompanying notes 73-75.

Within the military, the revelation of what happened at My Lai was a devastating blow to *esprit de corps* and professionalism. Even now, twenty-five years after the incident, the United States Army continues to recover from the pain that the My Lai massacre inflicted—a pain that still lingers in the very soul of every American soldier.³⁷

III. Why Did My Lai Happen?

Notwithstanding the social and political machinations that were brewing in the United States in the late 1960s and early 1970s, Americans had little problem focusing on the immediate question raised in the aftermath of the massacre—that is, “Why did My Lai happen?” The nation legitimately wondered how so many American soldiers could have become involved in such a heinous war crime.³⁸ More importantly, Americans wondered how the officers in command of the operation could have ordered such atrocities or could have participated in the attempt to cover them up. To realize that some civilians are killed as a collateral matter through military action against legitimate military targets was one thing; to have ground forces intentionally shoot innocent noncombatants in cold blood was incomprehensible.

A. The Peers Report

The Peers Report did not limit the cause of the My Lai massacre to only one factor. While the panel observed that “what may have influenced one man to commit atrocities had no effect on another,”³⁹ General Peers was determined that the final report should reflect some explanation as to why the massacre had occurred. Recognizing the inherent difficulty in finger pointing,

³⁷*Army Teaches Gulf Soldiers How to Avoid My Lai Type Massacre*, PITTSBURGH PRESS, Feb. 24, 1991, at A12 [hereinafter *Avoid My Lai*].

³⁸For a legal definition of the term, DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE, para. 499 (July 1956) [hereinafter FM 27-10] (“The term *war crime* is the technical expression for a violation of the law of war by any person or persons, military or civilian. Every violation of the law of war is a war crime”). The definition in FM 27-10 would include both customary and treaty law in the realm law of war. For a layman's definition, see also INT'L L. DIV., THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, JA 401, INTERNATIONAL LAW BASIC COURSE DESKBOOK 4-2 (July 1992) (“A non-legal, generic term for all illegal actions relating to the inception or conduct of warfare. It includes all the separate categories of offenses tried at Nuremburg. A more accurate term for this would be: Crimes under International Law”) Under a strict definition, the murder of civilian co-belligerents would be a crime, but not necessarily a war crime because the victims would not be protected persons under any international agreement or general customary principles relating to the conduct of war. By popular reference, however, such acts commonly are referred to as war crimes.

³⁹PEERS REPORT, *supra* note 13, at 229.

the panel nonetheless identified several factors that seemed to be conducive to an environment that might lead to violations of the law of war.

1. Lack of Proper Training.—The lack of proper training in the law of war was a common theme in the interviews of the witnesses and subjects involved in the My Lai massacre. Perhaps the most graphic illustration of this factor appeared at the trial of Lieutenant Calley, when Calley testified that the Geneva Convention classes conducted during Officer Candidate School were inadequate.⁴⁰ Regardless of the overall veracity of Calley's claim, the Peers Report entered specific findings that the soldiers who composed Task Force Barker had not received sufficient training in the "Law of War (Hague and Geneva Conventions), the safeguarding of noncombatants, or the Rules of Engagement."⁴¹ Although the requirements set out in United States Army Republic of Vietnam (USARV) Regulation **350-1**, dated 10 November 1967, clarified that, at a minimum, all soldiers were required to have annual refresher training in the Geneva Conventions, many commanders failed to emphasize this requirement. Consequently, individual soldiers often lacked proper training on the requirements imposed by these conventions.

The Commission also found that, although pocket-size guidance cards were issued to all soldiers to help them learn and abide by the law of war, the soldiers usually never read the information on the cards and the cards themselves rarely survived the first monsoon rains.⁴² In addition, Military Assistance Command Vietnam Directive 20-4,⁴³ which required the immediate reporting of all violations of the law of war, seldom was stressed by the command structure.

Despite these particular shortcomings, however, the Peers Report did not find deficiencies in the law of war training to be a

⁴⁰See *United States v. Calley*, 46 C.M.R. 1131 (A.C.M.R.), *aff'd*, 22 C.M.A. 534, 48 C.M.R. 19 (1973). *But see* Interview with Lindsay Dorrier by Major Jeffrey Addicott, in Charlottesville, Va. (12 Mar. 1992). A former classmate of Calley, Mr. Dorrier recalls that the Officer Candidate School did provide adequate law of war training to the students. Actually, all those going through Officer Candidate School received training in the four Geneva Conventions.

⁴¹PEERS REPORT, *supra* note 13, at 230.

⁴²See GOLDSTEIN ET AL., *supra* note 13, at 220. Four of the cards were entitled "The Enemy in Your Hands," "Nine Rules," "Code of Conduct," and "Geneva Conventions."

⁴³See Military Assistance Command Vietnam, Directive 20-4 (20 Apr. 1965) (requiring the immediate reporting of any alleged violation of the law of war to the next higher military authority, as well as directly to Headquarters, Military Assistance Command Vietnam, located in Saigon).

significant reason for the grave breaches⁴⁴ that occurred at My Lai. Such deficiencies in training might excuse minor or technical breaches of the law of war, but not the grave *malum in se* breaches that were before the Commission. The members of the Commission correctly noted that "there were some things a soldier did not have to be told were wrong—such as rounding up women and children and then mowing them down, shooting babies out of mother's arms, and raping."⁴⁵ Therefore, the Commission apparently had no hesitation in concluding that some of the members of the company—both enlisted men and officers—simply were criminals.⁴⁶ These individuals clearly were in an environment in which little, if anything, deterred them from overtly expressing their criminal propensities.

2. Attitude Toward the Vietnamese.—In addition to the lack of proper training, a tendency by some of the members of Charlie Company to view the Vietnamese people as almost subhuman was another factor that may have contributed to the massacre. The use of derogatory terms to describe the Vietnamese as nothing but "gooks," "dinks," or "slopes" was not uncommon during the Vietnam War. Actually, soldiers in all wars have developed derogatory phrases to describe their enemies;⁴⁷ such characterizations of inferiority inure soldiers to killing their enemy. In the My Lai case, however, the Peers Report concluded that some of the members of Charlie Company had carried this practice of dehumanizing the enemy to an unreasonable extreme, viewing

⁴⁴The term "grave breaches" technically is related only to specific violations defined as such in the Geneva Conventions. Grave breaches include specific acts committed against persons or property such as willful killing, torture, or inhuman treatment, including biological experiments, willfully causing great suffering, or willfully causing serious injury to body or health. See FM 27-10 *supra* note 35, at 179.

⁴⁵PEERS REPORT, *supra* note 13, at 230.

⁴⁶While one may possess a propensity for criminal behavior, all behavior is controlled directly by the individual's volition. In turn, the act of choosing to commit a crime often is related to a crude cost-benefit analysis process. Obviously, crime more likely will occur in an environment in which the likelihood of punishment is minimal. For an excellent discussion on how the criminal mind functions, see Dr. Stanton E. Samenow, Jr., *INSIDE THE CRIMINAL MIND* 6 (1984).

Criminals cause crime—not bad neighborhoods, inadequate parents, television, schools, drugs, or unemployment. Crime resides in the minds of human beings and is not caused by social conditions. Once we as a society recognize this simple fact, we shall take measures radically different from current ones. To be sure, we shall continue to remedy intolerable social conditions for this is worthwhile in and of itself. But we shall not expect criminals to change because of such efforts.

Id.

⁴⁷In World War II, Americans called the Germans "Krauts" and called the Japanese "Nips." In the Gulf War, some United States troops referred to the Iraqis as "Rag Heads."

the “Vietnamese with contempt, considering them subhuman, on the level of dogs.”⁴⁸

To discover the reason for such unsettling hatred, the Peers Report had a detailed background analysis performed on each individual in Company C. The results, however, revealed nothing unusual. The company was a then-average unit with seventy percent of its troops having high school diplomas and nineteen percent having some college education. The Commission concluded that the hatred was a result of a combination of several factors, the greatest of which was merely the arrogance inherent in the criminal mind; the least of which was the frustration of having to fight an enemy who refused to abide by the law of war.⁴⁹

3. Nature of the Enemy.—One of the most telling factors listed in the Peers Report dealt with examining the nature of the enemy forces that infested South Vietnam, with the implicit criticism that the United States military never was allowed to take the war to the real enemy—North Vietnam. In the South, the United States military was asked to carry out primarily defensive operations against a well-trained and well-equipped guerilla force that not only was indistinguishable from the local population, but also refused to abide by the established principles of the law of war.

They would set up their bunkers in villages and attack from the midst of helpless civilians. Thus, surrounding themselves with and using innocent civilians to protect themselves is in itself a war crime and makes them criminally responsible for the resulting civilian dead. ... [T]hey would also directly attack villages and hamlets, kill the inhabitants, including children, in order to panic the civilians in the area and cause social chaos that the communist then could exploit.⁵⁰

The Viet Cong and regular North Vietnamese Army soldiers knew every path, trail, and hut in their areas of operation. In addition, whether by brute force—which included public torture and execution—or by psychological intimidation, the Viet Cong could count on the local support of the civilian population for shelter, food, and intelligence. Similarly, these soldiers commonly could depend on women and children to participate actively in

⁴⁸PEERS REPORT, *supra* note 13, at 230.

⁴⁹See *infra* text accompanying notes 51-52.

⁵⁰RUMMEL, *supra* note 8, at 24.

military operations against United States forces.⁵¹ With women and children participating in actual combat activities—such as laying booby traps, serving as scouts, or carrying arms—the American soldier had to disregard the traditional indicators of sex and age as criteria for categorizing the noncombatant and, instead, had to concentrate on the extremely difficult issue of hostile intent. The Peers Report recognized this dilemma.

The communist forces in South Vietnam had long recognized our general reluctance to do battle with them among the civilian populace and had used that knowledge to our tactical and strategic disadvantage throughout the history of the war in Vietnam. Exploitation of that reluctance by ... [the enemy] forces caused a distortion of the classic distinction between combatants and noncombatants.⁵²

Distinguishing between friend and foe among military-aged male Vietnamese was even more difficult. Having developed an incredible system of underground tunnels and caves, the Viet Cong and North Vietnamese Army were able to appear and disappear at will. Moreover, when under pressure, these soldiers took only seconds to remove all military insignia and equipment, and blend in with the local population.

Without question, the use of guerilla tactics, characterized by a heavy reliance on booby traps and hit-and-run missions, had a tremendous adverse psychological impact on American commanders and their troops. After numerous interviews, the Peers Report noted that the general attitude of the soldier was one of extreme tension about engaging this unseen enemy—an enemy who hid behind women and children and would not come out in the open to do battle.⁵³

Every civilian was viewed as a potential threat; every inch of ground was a potential hiding place for a booby trap or mine. Accordingly, descriptive terms such as “keyed up” frequently were used to describe the apprehension and frustration associated with going out on patrol or, in many cases, just being in a friendly village.⁵⁴ The Viet Cong commonly would visit a friendly village at night, setting mines that would kill Americans the next day. Consequently, some of those who testified naturally assumed that

⁵¹GOLDSTEIN ET AL., *supra* note 13, at 199.

⁵²*Id.* at 198-99.

⁵³*Id.*

⁵⁴PEERS REPORT, *supra* note 13, at 234. The suggestions that members of Task Force Barker were either high on marijuana or intoxicated were found to be without substance and not a significant factor in the operation.

the “effects of mines and booby traps were the main reason for the atrocities committed by the task force.”⁵⁵ This view is incorrect. While these factors undoubtedly contributed to the extraordinary level of tension in Task Force Barker, citing the illegal warfighting tactics of the enemy as the primary reason for the atrocity would be far too simplistic. Actually, if this factor was the main cause for My Lai, one would have expected many massacres similar to My Lai to have taken place throughout Vietnam.

4. Organizational Problems.—One of the dominant characteristics of the Vietnam War was the lack of effective organization in the United States Army’s force structure. In the realm of directing combat operations, the lack of effective command and control can be disastrous. From the brigade level, down to platoons, shortages of personnel and frequent rotations resulted in ad hoc arrangements in composing military units.

Adding to the organizational deficiencies was the influx of poorly trained or ill-disciplined troops who were assigned to Vietnam on “short” tours of only one year.⁵⁶ These short tours virtually ensured that problems in command and control would arise. By the time the soldier had gained the necessary experience to be an effective member of a unit, he was eligible for transfer back to the “States.”

Taking strong note of the overall organizational problems throughout the Army structure in Vietnam, the Peers Report found that certain specific organizational problems in Task Force Barker “played the most prominent part in the My Lai incident.”⁵⁷ Focusing on the structure of Task Force Barker, the report noted that the lack of staff personnel was a serious impediment to effective command and control. The task force “could hardly function properly, particularly in such matters as development of intelligence, planning and supervision of operations, and even routine administration.”⁵⁸

In addition to the general organizational problems in the task force, the plans and orders that delineated the operation into Son My lacked clarity. Because the entire operation was based on intelligence that anticipated a large enemy force in the area, the American soldiers initially expected that they were going to be

⁵⁵*Id.* at 235.

⁵⁶*Id.* Many of the combat officer positions were rotated after only six months in the field.

⁵⁷*Id.*

⁵⁸*Id.* at 235.

outnumbered by at least two to one.⁵⁹ In addition, the task force leaders regularly employed the term "search and destroy"⁶⁰ without providing an adequate definition to the troops. Despite the term's connotation, "search and destroy" never was meant to provide soldiers with a "license to kill" whoever was encountered during an operation. In particular, the Peers Report found that the command gave no instructions to its soldiers on how to handle the civilians that they inevitably would encounter during the Son My operation.⁶¹

5. *Leadership*.—In the final analysis, organizational problems contributed to an overall atmosphere that made the events at My Lai possible. The most fundamental aspect of the task force's pervasive structural deficiency, however, was the command and control problem created by the tremendous lack of leadership at the ground level.

"You know what to do with them," [Lieutenant] Calley said, and walked off. Ten minutes later he returned and asked, "Haven't you got rid of them yet? I want them dead. Waste them." . . . We stood about ten to fifteen feet away from them [a group of eighty men, women, and children herded together] and then [Lieutenant Calley] started shooting them. I used more than a whole clip—used four or five clips.⁶²

As with almost any military operation, success or failure depends, to at least some degree, on proper leadership. In the case of My Lai, however, the lack of responsible leadership was obvious. More importantly, as the above passage indicates, that failure of leadership was manifest at the very level at which it was most critical—the junior officer level.⁶³ Although the Peers

⁵⁹See *supra* note 16 and accompanying text.

⁶⁰PEERS REPORT, *supra* note 13, at 236. The military no longer uses the term "search and destroy." During the Vietnam War, it was defined as a "military operation conducted for the purpose of seeking out and destroying enemy forces, installations, resources, and base areas." See GOLDSTEIN ET AL., *supra* note 13, at 389.

⁶¹PEERS REPORT, *supra* note 13, at 237.

⁶²Wilson, *supra* note 14, at 52 (citing Private Paul D. Medlo (1969)); GOLDSTEIN ET AL., *supra* note 13, at 499. Another witness, Private First Class Dennis Conti, related at the trial of Lieutenant Calley that he and Medlo were told to "take care of the people." When Lieutenant Calley returned, however, he was upset that the civilians had not been killed. Lieutenant Calley then stated, "I mean kill them."

⁶³The My Lai massacre was not the only command-directed atrocity in Vietnam. A few less extensive killings occurred in which superiors unlawfully ordered subordinates to kill civilians. See, e.g., GARY D. SOLIS, MARINES AND MILITARY LAW IN VIETNAM: TRIAL BY FIRE 176 (1989).

[Lance Corporal] Herrod gave the order to kill ... the people,

Report faulted all levels of command, noting that “at all levels, from division down to platoon, leadership or the lack of it was perhaps the principal causative factor in the tragic events before, during, and after the My Lai operation,”⁶⁴ the direct underlying deficiency most certainly rested at the company and platoon level.

By virtue of the chain of command structure of the military, the primary responsibility for ensuring adherence to the law of war rests on the officer corps. This structure demands the highest levels of professionalism from the junior officers at the platoon and company level, at which soldiers are most apt to encounter the vast majority of law of war issues. Simply put, soldiers are expected to obey the law of war and their officers are expected to ensure that they do.

The difficult issue in enforcing the law of war is not in how to deal with soldiers or officers who, in their individual capacities, violate the law of war—they normally are punished by courts-martial.⁶⁵ Rather, the really difficult issues arise when an officer orders his or her soldiers to commit war crimes, or knowingly fails to control soldiers under his or her command who violate the law of war.⁶⁶ Clearly, the most difficult issue to arise from the My

and I told him not to do it Then he says, “Well, I have orders to do this by the company commander, and I want it done,” and he said it again, “I want these people killed!” And I turned to PFC Boyd, and I said to PFC Boyd, “Is he crazy, or what?” And Boyd said, “I don’t know, he must be.” ... And then everybody started opening up on the people.

Id. (quoting Lance Corporal Michael S. Krichten, Vietnam 1970).

⁶⁴PEERS REPORT, *supra* note 13, at 232.

⁶⁵See FM 27-10, *supra* note 38, para. 506(a). Under the Geneva Conventions, each nation is under a strict obligation to search for all persons alleged to have committed war crimes, to investigate the allegations of war crimes, and to prosecute or extradite those so accused. The policy of the United States is that all American military personnel so accused will be prosecuted by military courts-martial under the substantive provisions of the Uniform Code of Military Justice. See also GERHARD VON GLAHN, LAW AMONG NATIONS 870-91 (1991).

⁶⁶See LAWRENCE TAYLOR, A TRIAL OF GENERALS 165-67 (1981). Under the concept of command responsibility or indirect responsibility, a commander can be charged with the law of war violations committed by his or her subordinates if he or she ordered the crimes committed or “knew that a crime was about to be committed, had the power to prevent it, and failed to exercise that power.” In the United States, this standard has come to be known as the Medina Standard, so named for Captain Ernest Medina. A second standard for indirect responsibility that has been the object of a great deal of debate and is recognized only in the United States, is the Yamashita Standard. The Yamashita Standard is named for the World War II Japanese general, Tomoyuki Yamashita, who was tried before a military commission for war crimes committed by soldiers under his command. The primary charge against Yamashita concerned 20,000 Japanese sailors under his command who went on a murder and rape rampage in Manila near the end of the war. Although the prosecution was unable to prove that Yamashita ordered the crimes, or even knew about them, he was convicted under a “should have

Lai incident was how to reconcile command-directed breaches of the law of war with the concept of following orders. If every soldier is expected to obey the lawful order of a superior, lest face the ominous prospect of a court-martial, how should a soldier react to an unlawful order—that is, of course, assuming the soldier actually can recognize the order as an unlawful one?⁶⁷

In considering the question whether a superior order constitutes a valid defense, the court shall take into consideration the fact that obedience to lawful military orders is the duty of every member of the armed forces; that the latter cannot be expected, in conditions of war discipline, to weigh scrupulously the legal merits of the orders received; that certain rules of warfare may be controversial; or that an act otherwise amounting to a war crime may be done in obedience to orders conceived as a measure of reprisal. At the same time it must be borne in mind that members of the armed forces are bound to obey only lawful orders.⁶⁸

Furthermore, soldiers normally cannot depend on the defense of superior orders to protect them from charges that they carried out unlawful orders. Instead, the law holds the soldier fully responsible for his or her acts or omissions. When a soldier raises superior orders as a defense, however, a court will apply a two-tier test to determine if the defense is cognizable. The first tier is a subjective one concentrating on whether or not the accused knew that the order was illegal. If the accused did not know that the order was illegal then the inquiry shifts to the second tier, at which the court must determine whether the accused reasonably could have been expected to know that the order was illegal. “The fact that the law of war has been violated pursuant to an order of a superior authority ... does not constitute a defense ... unless [the accused] did not know and could not reasonably have been expected to know that the act ordered was unlawful.”⁶⁹ Although the objective tier of the two-part test draws upon the “reasonable man” standard, the

known” standard. This standard permits a commander to be found guilty for war crimes under a theory that, through normal events, the commander should have known of the war crimes of those under his or her command, and did nothing to stop them. The commander, therefore, is vicariously guilty of the actions of his or her soldiers. This “should have known” standard applies only when the war crimes are associated with a widespread pattern of abuse over a prolonged period of time. In such a scenario, the commander is presumed to have knowledge of the crime or to have abandoned his or her command.

⁶⁷See FM 27-10, *supra* note 38, para. 509.

⁶⁸*Id.* para. 509.

⁶⁹*Id.*

standard actually considers the actions of a reasonable man under the stresses present in the particular combat environment.

The task of distinguishing the legitimacy of the orders of a superior also must be viewed against the entire concept of enforced discipline, which the military systematizes from the first day a recruit enters boot camp until the day he or she is discharged. The requirement for enforced discipline is absolutely essential to ensure that in the unnatural conditions of the combat environment soldiers will be able to function properly. No army could survive without a system promoting genuine and enforced discipline, which is rooted firmly in the requirement to obey the directions of superiors. Accordingly, if soldiers are expected to obey all lawful orders, *a fortiori*, they reasonably cannot be expected to scrupulously weigh the legal merits of orders received under the stresses of combat.⁷⁰

Consequently, an army must fill its officer corps with only the finest available men and women. Nowhere is this requirement more essential than in the selection and placement of the men who serve as officers in combat units. Only men of the highest moral caliber and military skill should be assigned the responsibility of combat command. In commenting on leadership skills for officers, General George S. Patton, Jr., correctly stated, "If you do not enforce and maintain discipline, [officers] are potential murderers."⁷¹

General Patton's comment prophesied the tragedy at My Lai. Several of the junior officers on the scene were totally inadequate, not only in their moral characters and integrities, but also in basic military skills. As they exhibited by their behaviors,⁷² these officers were totally unworthy of the responsibility of command. They were murderers.

Not surprisingly, William Calley—the centerpiece of the command-directed killings—was not the type of individual who

⁷⁰*Id.*

⁷¹PETER B. WILLIAMSON, PATTON'S PRINCIPLES: A HANDBOOK FOR MANAGERS WHO MEAN IT 35 (1979).

⁷²See *supra* note 46 and accompanying text. For an interesting observation concerning the nature of man, see THE DICTIONARY OF WAR QUOTATIONS 341 (Justin Wintle ed., 1989). Anne Frank wrote the following in 1942:

I don't believe that the big men, the politicians and the capitalists alone, are guilty of war. Oh no, the little man is just as guilty, otherwise the peoples of the world would have risen in revolt long ago. There's in people simply an urge to destroy, an urge to kill, to murder and rage, and until all mankind, without exception, undergoes a great change, wars will be waged, everything that has been built up, cultivated, and grown will be destroyed and disfigured, after which mankind will have to begin all over again.

should have been charged with leadership responsibilities of any nature. Having flunked out of a junior college in Miami, Calley moved west before enlisting in the Army in 1966.⁷³ Once in the Army, Calley somehow was selected to attend Officers Candidate School, where he graduated despite poor academic marks.⁷⁴ Assigned to the field as a platoon leader in a combat unit, the soldiers under his command quickly discovered that Lieutenant Calley did not even understand basic military combat skills. As one rifleman in the platoon put it, "I wonder how he ever got through Officer Candidate School. [Calley] couldn't read no darn [sic] map and a compass would confuse his ass."⁷⁵

Accordingly, the factor that impacted most directly on the crime at My Lai certainly rested on the shoulders of a few junior officers on the ground—Lieutenant William Calley being one of the worst. All of the evidence suggests that Lieutenant Calley initiated much of the murder, acting both in his individual capacity and—far more shamefully—in his capacity as an officer in charge of subordinates. Abusing the authority of his position, Lieutenant Calley directly ordered the soldiers under his command to commit murder; some of the men obeyed, while some did not. While no one can pardon the behavior of those who carried out the illegal orders, the real tragedy of My Lai was the absence of competent leadership.

As Sun Tzu laid out almost 2500 years ago, "The commander stands for the virtues of wisdom, sincerity, benevolence, courage, and strictness."⁷⁶ Instead of setting the standard for moral conduct, Calley performed exactly in the opposite manner. He represented the antithesis of what a commander should be.

6. The Lack of a Grand Strategy by the United States.—A final factor that bears exploration is one that few commentators on My Lai have properly gauged—that is, the full impact that the lack of a grand strategy by the United States had on the outcome of the Indo-China conflict. My Lai actually was made possible because of the total and complete absence of a grand strategy to deal with the communist-sponsored aggression against South Vietnam.

If the concept of a grand strategy is defined as the use of a state's full national power to achieve a particular objective, the United States clearly had no grand strategy for dealing with the

⁷³Wilson, *supra* note 14, at 50.

⁷⁴*Id.*

⁷⁵*Id.* (remarks of Rifleman Roy L. A. Wood).

⁷⁶THE ART OF WAR: SUN Tzu 9 (James Clavell ed., 1983)

communist aggression in Vietnam. The communists, on the other hand, obviously had a complete and dedicated grand strategy for conquering all of Indo-China through the use of revolutionary warfare.⁷⁷

A sound grand strategy envisages the means by which a nation will take advantage of its strengths and will exploit its enemy's vulnerabilities; concomitantly, such a grand strategy comprises the methods by which the nation will diminish its weaknesses and neutralize the enemy's strengths. In practically every category of factors associated with the art of waging war, the communists fulfilled this formula, while the United States did not. Therefore, while the communists mobilized all of the people under their control in a unified effort, the United States consistently sought to disassociate the American people from the war.

The communists were well aware that their forces were no match for the far superior power of American combat forces and knew that engaging the United States in conventional warfare was pure folly. Nevertheless, they apparently were extremely effective at drawing on their strengths, while the United States typically refused to use its overwhelming might. Accordingly, the enemy found that it effectively could employ hit-and-run tactics against selected targets. Coupled with guerilla tactics deliberately focused on becoming the unseen enemy, the communists illegally took advantage of the American respect for the law of war. By hiding themselves among civilian populations, the communists intentionally sought to blur the distinction between the combatant and the noncombatant, "hoping either for immunity from attack or to provoke ... indiscriminate attack."⁷⁸ Establishing well-stocked sanctuaries in neighboring Cambodia and Laos, the communists were immune from defeat as long as the United States refused to attack these bases.

Finally, in tandem with their guerilla tactics, the communists relied heavily on all forms of propaganda, placing special emphasis on the ambiguity of words to erode the national will of the United States to continue the war. While the North Vietnamese leadership falsely would portray the conflict as a protracted war waged by agrarian reformers with no end in sight,

⁷⁷See KEVIN M. GENEROUS, *VIETNAM: THE SECRET WAR* (1985). The term "revolutionary war" refers to a strategy characterized by disinformation and guerilla tactics.

⁷⁸Thomas J. Begines, *The American Military and the Western Idea*, MIL. REV., Mar. 1992, at 39, 42.

it often would promise a negotiated settlement and a termination of its army's hostilities at any moment.

Although many of the factors discussed above contributed to the communists' prevailing in Vietnam, their strategy's ultimate success can be attributed to the United States' failing to develop its own coherent grand strategy. Surprisingly, not until 1968 did the impact of not having a viable grand strategy become apparent to the American soldier. United States combat troops then finally began to recognize that they were fighting and risking their lives to attain no comprehensive national objective. This revelation initiated a festering demoralization among members of the United States military forces in Vietnam.

This demoralization was manifest in every action involving American ground soldiers. In addition, as the attendant anti-war protests at home increased, more soldiers seriously questioned the efficacy of their sacrifices in Vietnam. More importantly, American soldiers such as those at My Lai realized that the emphasis of the American leadership was not on achieving peace through a military victory, but on peace through negotiations—negotiations that constantly promised an end to the war at any time. As a consequence, no one wanted to be the last casualty in a war that was not supported at home and which the United States government refused to let the military win. The specter of dying in vain weighed heavily on the mind of the individual soldier and, to a degree, degenerated that soldier's respect for his own chain of command.

IV. The Lessons of My Lai

The massacre at My Lai cannot be undone. In developing a methodology for preventing future atrocities, however, the images of the horror of My Lai illustrate perfectly the necessity for abiding by the law of war. The Peers Report also is a valuable tool in attempting to explain some of the factors that seemed to create an environment in which law of war violations were more likely to occur. Taken together, these resources teach three fundamental lessons.

A. Soldiers Must Understand the Rationale for the Law of War

One of the most troubling issues for American soldiers is the realization that in many of the wars that the United States has fought, the enemy openly and repeatedly has violated numerous

provisions of the law of war.⁷⁹ In the Vietnam War, the North Vietnamese Army and the Viet Cong regularly engaged in command-directed atrocities on a massive scale.⁸⁰ For example, virtually every American prisoner of war was tortured and maltreated in flagrant violation of the Geneva Conventions.

For many American soldiers, the knowledge of enemy violations elicits a negative response to law of war issues. The realization that the enemy may refuse to abide by the law of war often prompts the instinctive response, "Why should I care about the rules if the enemy doesn't?" Informing the soldier that he or she will be punished for law of war violations is not enough; ensuring that the soldier understands the basic rationale for abiding by the law of war is imperative. Accordingly, military leaders must impart the soldier with a basic understanding of the entire concept of the development of rules regulating combat.

If the military establishment cannot understand the fundamental rationale and historical basis for having a law of war, then the tragedy at My Lai certainly will be repeated. This is the first lesson of My Lai; soldiers not only must know the law of war, but also must be able to understand the necessity and rationale for having a law of war.

1. Necessity for the Law of War.—Warfare is not a novel phenomenon; it is as old as human history itself. Even a cursory review of the practice reveals that all cultures and societies have participated in warfare—either in defense or in aggression. In addition, as long as mankind has practiced war, rules have existed to lessen and regulate the attendant sufferings associated with warfare. In the modern world, either by treaty law or through customary⁸¹ international law, every nation is bound legally by a universal body of law known as the law of war.

⁷⁹See LOUIS HENKIN ET AL., *MIGHT V. RIGHT* 126 (2d ed. 1991). The conduct of the Iraqis during the Persian Gulf War made a mockery of almost every precept in international law. Actually, throughout the entire war, Saddam Hussein made no attempt even to conceal his open violations of the law of war, the United Nations Charter, or any other applicable international norm. As one Pentagon official noted, "it was as if Saddam Hussein awoke one morning and asked, 'What international law shall I violate today?'"

⁸⁰RUMMEL, *supra* note 8 and accompanying text.

⁸¹A state may express its consent to be bound by a treaty in one of the following ways: (1) signature, followed by ratification; (2) accession; or (3) a declaration of succession. Even absent consent, however, a state nevertheless may become bound by those standards and norms of behavior that, through widespread acceptance in the international community, have entered the realm of customary principles of international law. Customary principles derive from the recognition of long-term uniform practices among nations. Indicia of customary international law are judicial rulings, the writings of renowned jurists, diplomatic interactions, and other documentary sources. See Statute of the International Court of Justice, art. 38, 59 Stat. 1031, T.S. No. 993, 3 Bevans 1179. Accordingly, both international law and the law of war derive from numerous sources.

Individuals uninitiated to the study of war understandably may be puzzled that one of humanity's most violent activities should be governed by rules of conduct. Some writers, such as Leo Tolstoy, even have argued that the very establishment of rules that seek to regulate warfare are per se immoral because such rules wrongfully cloak war with a form of legitimacy and therefore are counterproductive to the goal of eliminating the scourge of war itself. Accordingly, Tolstoy advanced the notion that the waging of war should not be regulated. Tolstoy proposed that "when [war] becomes too horrible, rational men will outlaw war altogether."⁸² Most commentators, however, have rejected this utopian attitude, acknowledging the necessity of rules of conduct to mitigate the various categories of suffering that are the natural consequence of war.⁸³ The law of war never was intended to be an "idealistic proscription against war."⁸⁴

The current body of the law of war consists of all laws that, by treaty and customary principles, are applicable to warfare. The cornerstones of the modern law of war are the Geneva Conventions of 1949.⁸⁵ The basic goal of the law of war is to limit the impact of the inevitable evils of war by "(1) protecting both combatants and noncombatants from unnecessary suffering; (2) safeguarding certain fundamental human rights of persons who fall into the hands of the enemy, particularly prisoners of war, the wounded and sick, and civilians; and (3) facilitating the restoration of peace."⁸⁶

2. Origins of *the* Law of War.—Many people harbor the misconception that rules regulating warfare are of relatively recent origin, arising in the aftermath of World War II or, at least, no earlier than World War I. As long as man has fought in wars, however, rules to reduce the suffering to both the environment and to other humans have existed. While some of these ancient

⁸²LEO TOLSTOY, *WAR AND PEACE* 45 (1868).

⁸³*See generally* DIETRICH SCHINDLER & JIRI TOMAN, *THE LAWS OF ARMED CONFLICT* (1988).

⁸⁴*See* DEP'T OF ARMY, PAMPHLET 27-161-2, *INTERNATIONAL LAW*, vol. 11, at 38 (23 Oct. 1962).

⁸⁵The 1949 Geneva Conventions cover four categories: (1) Geneva Convention of August 12, 1949, for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31; (2) Geneva Convention of August 12, 1949 for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85; (3) Geneva Convention of August 12, 1949, Relative to the Treatment of Prisoners of War 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135; and (4) Geneva Convention of August 12, 1949, Relative to the Protections of Civilian Persons in Time of War, 6 U.S.T. 3316, T.I.A.S. No. 3365, 75 U.N.T.S. 287.

⁸⁶FM 27-10, *supra* note 38, para. 2.

rules would be inconsistent with the modern humanitarian concepts reflected in the current law of war, many of the provisions in the modern law of war are derived directly from some of the earliest formulations of rules regulating warfare. For example, in the book of *Deuteronomy*, the ancient Hebrews were given specific instructions on the protections that were to be afforded to the persons or property of an enemy city under siege.⁸⁷ Generally, if the city surrendered, the inhabitants were not to be harmed. If the city refused to surrender, but subsequently was captured, no women or children were to be molested. In all cases, however, torture absolutely was prohibited. Similarly, protection for the environment also was codified. For example, fruit trees located outside of a besieged city were protected from unnecessary damage. Soldiers could partake of the fruit, but cutting down the trees was unlawful.

Acknowledging that the modern law of war rests firmly on an ancient foundation of intrinsically acceptable humanitarian concerns is only one reason why the law of war has enjoyed universal acceptance through time. Understanding that such rules are valuable moral axioms only captures part of the significance of their development and utility. Clearly, the historical development of rules regulating warfare also follows a general pattern of what might be termed "pragmatic necessity." While many of the rules limiting suffering undoubtedly were based on humanitarian concerns, the basic rationale for having a law of war arguably has been rooted in several collateral principles of self-interest.

First, under the concept of reciprocity, nations would develop and adhere to laws of war because they were confident that their enemies also would abide by those rules under a quid pro quo theory. This mutual assurance theory long has been recognized not only as a primary motivator for establishing rules regulating warfare, but also as the centerpiece in almost every other function of international intercourse.

The second element in the development of the law of war also reflects self-interest. Alexander the Great⁸⁸ exemplified this

⁸⁷DEUTERONOMY 20:10-20. But see *id.* 21:17-18. Some mandates were given for the Hebrews to kill all of the citizens of a few selected cultures. This practice, however, was the exception and was related to halting the spread of systematic human sacrifice and phallic cult practices associated with those cultures.

⁸⁸Alexander the Great (356-323 B.C.) conquered an enormous empire which extended from India to Europe and from Asia Minor to North Africa. Alexander is recognized as one of the finest strategists, tacticians, and military commanders in the ancient world. See R. ERNEST DUPUY & TREVOR N. DUPUY, *THE ENCYCLOPEDIA OF MILITARY HISTORY* 47-54 (1977).

element when, on the eve of practically every battle, he admonished to his army, "Why should we destroy those things which shall soon be ours?"⁸⁹ Under this reasoning, particularly in the context of securing limited amounts of spoil, the destruction of anything beyond military targets to subdue the enemy's military forces would be neither beneficial nor reasonable. Under modern principles, similar violations of the law of war would not contribute to the goal of the collection of legitimate reparations—a measure often employed against the aggressor nation.⁹⁰

A third line of reasoning in the development of the law of war derives from an acceptance that abuses seldom shorten the length of the conflict and are never beneficial in facilitating the restoration of peace. For instance, targeting nonmilitary property usually produces undesirable effects. The activities of General William Sherman during the Civil War illustrate this point. General Sherman's widespread looting and burning of civilian homes and personal property on his march through Georgia in the fall of 1864 did not contribute significantly to the defeat of the

⁸⁹*Id.*

⁹⁰*Definition of Aggression*, G.A. Res. 3314, 29 G.O.A.R. Supp. 31, U.N. Doc. A/9631, at 142. The United Nations Definition of Aggression Resolution states, in part the following:

ARTICLE 1. Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any manner inconsistent with the Charter of the United Nations

ARTICLE 2. The first use of armed force by a State in contravention of the Charter shall constitute *prima facie* evidence of an act of aggression

ARTICLE 3. Any of the following acts, regardless of a declaration of war, shall ... qualify as an act of aggression:

- (a) The invasion or attack by the armed forces of a State of another State or part thereof;
- (b) Bombardment by the armed forces of a State against the territory of another State ... ;
- (c) The blockade of the ports or coasts of a State by the armed forces of another State;
- (d) **An** attack by the armed forces of a State on the land, sea or air forces, or marine and airfleets of another State;
- (e) The use of armed forces of one State ... in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
- (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
- (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

Confederacy.⁹¹ On the contrary, his actions simply strengthened the resolve of the enemy to resist, while sowing the seeds of bitterness for generations to come.⁹²

Clearly, the intelligent warfighter makes every effort to comply with, and even to exceed, the requirements of the law of war—particularly in the treatment of prisoners of war and noncombatants. A nation's enforcement of humane treatment not only demonstrates the best evidence that it is the party waging a *jus in bello*,⁹³ but also often serves as the best avenue to counter enemy propaganda of law of war violations. As the pragmatic Prussian soldier and author, Karl von Clausewitz observed, "If we find that civilized nations do not ... devastate towns and countries, this is because their intelligence exercises greater influence on their mode of carrying on war, and has taught them a more effectual means of applying force ..."⁹⁴

A fourth factor in the development of the law of war is a matter of military pragmatism. Specifically, using limited military resources to destroy civilian targets wastes assets that a force otherwise could employ to defeat the enemy's military. Accordingly, such conduct is simply counterproductive, and "rarely gains the violator a distinct military advantage."⁹⁵

The final rationale—albeit of greater impact in an era characterized by the widespread dissemination of information—derives from the very nature of the modern, civilized nation-state. States that adhere to the principles of democratic institutions and fundamental human rights will not tolerate activities that are

⁹¹See Thomas Robertson, *The War in Words*, CIVIL WAR TIMES ILLUS., Oct. 1979, at 20 ("Although the havoc wreaked by Sherman's hordes contributed to the Confederate defeat, this contribution was so indirect and ambiguous that it did not justify militarily, much less morally, the human misery that accompanied and followed it").

⁹²See, e.g., RUSSEL F. WEIGLEY, *HISTORY OF THE UNITED STATES ARMY* 301 (1984).

⁹³*Jus in bello* refers to just conduct, in war or abiding by the law of war under the concepts of proportionality, military necessity, and unnecessary suffering. The concept of waging a just war, *jus ad bellum*, encompasses several elements. These elements include the following: (1) just cause; (2) legitimate authority; (3) just intentions; (4) public declaration of causes and intentions; (5) proportionality in results; (6) last resort; and (7) a reasonable hope of success. With the adoption of the United Nations Charter, however, *jus ad bellum* is no longer a viable tool in determining when force is lawful. The United Nations Charter mandates that the analysis for determining the legitimate use of force turn on the self-defense provisions of Article 51. See WILLIAM V. O'BRIEN, *THE CONDUCT OF JUST AND LIMITED WAR* 37-70 (1981).

⁹⁴KARL VON CLAUSEWITZ, *ON WAR* 4 (J. Graham trans., 1918).

⁹⁵H. Wayne Elliott, *Theory and Practice: Some Suggestions for the Law of War Trainer*, *ARMY LAW*, July 1983, at 1.

conducted in defiance of the rule of law.⁹⁶ As brought out so strongly by the My Lai incident, civilized societies will not provide the necessary homefront support for an army that it perceives to be acting in violation of the law of war. Although in the radical regime⁹⁷ this factor generally is ignored, in the United States—as in all democratic societies—this element of homefront support is absolutely essential to any deployment and sustainment of military forces. Actually, the precept that a civilized society must adhere to basic, minimum “standards of morality transcends national boundaries.”⁹⁸

Sustaining homefront support is not always easy for the military. In part, the difficulty rests in the associated phenomenon of “imputed responsibility”—that is, the responsibility for the acts of a few soldiers who engage in egregious abuses of the law of war immediately can be imputed to the entire military establishment. Accordingly, because Lieutenant Calley and a handful of others murdered babies at My Lai, some segments of the public viewed all American soldiers in Vietnam as baby killers. The mass media largely feed this phenomenon, as reflected by almost every movie on the Vietnam War. In American cinema, the soldier routinely has been depicted engaging in abuses of the law of war or ingesting illegal drugs. That the vast majority of American soldiers participated in neither of these practices is not shown.⁹⁹ Consequently, the best method for the military to protect itself from imputed responsibility is to make every possible effort to see that abuses do not occur and, if they

⁹⁶*Id.* at 7.

⁹⁷The term “radical regime” was coined by Professor John Norton Moore, Walter L. Brown Professor of Law, University of Virginia School of Law, to describe totalitarian systems that are likely to resort to violence to achieve goals. See JOHN NORTON MOORE, ET AL. NATIONAL SECURITY LAW 77 (1990). Professor Moore describes the characteristics of the radical regime as follows:

A radical totalitarian regime ... seems to blend together a mixture of a failing centrally planned economy, severe limitations on economic freedom, a one party political system, an absence of an independent judiciary, a police state with minimal human rights and political freedoms at home, denials of the right to emigrate, heavy involvement of the military in political leadership, a large percentage of the GNP devoted to the military sector, a high percentage of the population in the military, leaders strongly motivated by an ideology of “true beliefs” including willingness to use force, aggressively anti-Western and antidemocratic in behavior, and selective support for wars of national liberation, terrorism, and disinformation against Western or democratic interests.

⁹⁸*Id.*

⁹⁹See SOLIS, *supra* note 63, at vii. The vast majority of military personnel in Vietnam served with honor. In the Marines, “[o]f the 448,00 Marines that served in Vietnam, only a small percentage came into contact with the military justice system. By far the greater number served honorably and never committed illegal or improper acts.” *Id.*

do, to promptly investigate and punish those proven to be guilty. Under no circumstances can a cover-up be justified; the light must be shed promptly and fully on all allegations of war crimes.

The law of war in the modern era, therefore, is based on a combination of rationales that reflect a mixture of pragmatic and moral concerns. The competent warfighter should understand that the factors include the following: (1) humanitarian concerns based on moral precepts; (2) the concept of reciprocity in behavior; (3) the desire for lawful reparations; (4) the desire to limit the scope and duration of the conflict and to facilitate the restoration of peace; (5) the effective use of military resources; and (6) the necessity for securing homefront support.

B. Soldiers Must Be Trained in the Law of War

The second lesson from My Lai needs little introduction: To be effective, the leaders constantly must teach the law of war to soldiers. The United States military long has held an outstanding reputation for adhering to the law of war because of its commitment to law of war training.¹⁰⁰ Unfortunately, periods have arisen during which training has not been emphasized properly; these periods provided fertile ground for law of war violations. If it did nothing else, the massacre at My Lai served as the “catalyst for a complete review of Army training in the law of war.”¹⁰¹

The primary Department of Defense (DOD) response to the Peers Report was a directive entitled the “DOD Law of War Program.” The directive, which is still in effect, lists the following four specific DOD mandates:

(1) The law of war and the obligations of the United States government under that law shall be observed fully by all members of the United States Armed Forces;

(2) A law of war program, designed to prevent violations of the law of war, shall be implemented;

(3) All alleged violations of the law of war, whether committed by or against United States or enemy personnel, shall be reported promptly, investigated thoroughly, and, when appropriate, remedied by corrective action; and

¹⁰⁰ But see Fredrick A. Graf, *Knowing the Law*, PROCEEDINGS, June 1988, at 58. If the record United States is measured against the rules and not against its adversaries the record has “been far from perfect.”

“Elliott, *supra* note 95, at 9.

(4) All violations of the law alleged to have been committed by or against allied military or civilian personnel shall be reported through appropriate command channels for ultimate transmission to appropriate agencies of allied governments.

Specific responsibilities are assigned to the secretaries of the military departments and the unified and specified commands on law of war training and instruction. The Army is the training proponent for the law of war for all branches of the military. In response to that mandate, the Army has developed a ready-made lesson plan for the law of war instructor, which includes detailed discussion in the following areas:

(1) The rights and obligations of United States Army personnel regarding the enemy, other personnel, and property;

(2) The rights and obligations of United States Army personnel if captured, detained, or retained;

(3) The requirements of customary and conventional law pertaining to captured, detained, or retained personnel, property, and civilians;

(4) The probable results of acts of violence against, and inhuman treatment of, personnel;

(5) Illegal orders;

(6) Rules of Engagement; and

(7) The procedures for reporting war crimes.¹⁰²

The current methodology for teaching the law of war attempts to tailor the training to the particular type of military unit. Special Forces units, for example, not only receive constant classroom instruction on the law of war, but also must answer difficult law of war questions. These questions deal with situations that could arise during special operations and are incorporated in their training missions.¹⁰³ The much-reported incident of the Gulf War, in which a Special Forces "A team had to choose between killing an Iraqi girl or risk being discovered, actually was a well-trained scenario which, in the real world,

¹⁰²DEPT OF ARMY, REG. 350-216, TRAINING—THE GENEVA CONVENTIONS OF 1949 AND HAGUE No. IV OF 1907, para. 5a (7 Mar. 1975); see Elliott, *supra* note 95, at 33.

¹⁰³See Gary L. Walsh, *Role of the Judge Advocate in Special Operations*, ARMY LAW., Aug. 1989, at 6-8; Jeffrey F. Addicott, *Developing a Security Strategy for Indochina*, 128 MIL. L. REV. 35 (1990).

resulted in a correct application of a very difficult law of war issue.¹⁰⁴

The one thread that runs throughout the complex web of ensuring compliance with the law of war is the role of the judge advocate. To ensure that American forces comply with all aspects of the law of war, the Army has expanded its use of military attorneys dramatically.¹⁰⁵ For example, all combat forces have an "operational law"¹⁰⁶ attorney assigned at the division level. This judge advocate advises operational commanders on decision-making and training to ensure that their units comply with and adhere to the law of war. The operational law advisor also examines the full range of international and domestic law that impacts "specifically upon legal issues associated with the planning for and deployment of U.S. forces overseas in both peacetime and combat environments."¹⁰⁷ This is a major change from the role of judge advocate in Vietnam—a role primarily delegated to the administration of military justice.

Currently, the function of the judge advocate can be divided into two elements: a preventive role and an active role. In the preventive role, the judge advocate advises commanders on potential issues dealing with rules of engagement, targeting, and all other relevant aspects of the law of war. In addition, the judge advocate is involved deeply in providing actual law of war instruction and training to soldiers within his or her particular command.

¹⁰⁴Douglas Waller, *Secret Warriors*, NEWSWEEK, June 17, 1991, at 20. Each Special Forces group has a military attorney assigned as the group judge advocate. Part of the function of this officer is to deal with operational law issues associated with special operations.

¹⁰⁵See, e.g., James A. Burger, *International Law—The Role of the Legal Advisor, and Law of War Instruction*, ARMY LAW., Sept. 1978, at 22; William H. Parks, *The Law of War Advisor*, 31 JAG J. 1 (1980).

¹⁰⁶See David E. Graham, *Operational Law (OPLAW)—A Concept Comes of Age*, ARMY LAW., July 1987, at 9.

¹⁰⁷One major effort to prepare operational law attorneys was the establishment of the Center for Law and Military Operations (CLAMO) by then-Secretary of the Army, John O. Marsh Jr., in December of 1988. The CLAMO is located at The Judge Advocate General's School, U.S. Army, in Charlottesville, Virginia. The goal of the CLAMO is to examine both current and potential legal issues attendant to military operations through the use of professional exchanges such as symposia, consultations, and advice; writing, reviewing, editing, commenting on, and publishing reports, treatises, articles, and other written materials; and ensuring access to a well-stocked joint service operational law library. The CLAMO serves as a source for, guide to, and clearinghouse of, information about operational law and national security law. See Jeffrey F. Addicott, *Operational Law Note: Proceedings of the First Center for Law and Military Operations Symposium, 18 to 20 April 1990*, ARMY LAW., Dec. 1990, at 47-57.

In the active role, the judge advocate is involved in the investigation of allegations of law of war violations. The requirement to investigate is either carried out directly by the legal officer or is monitored closely by the judge advocate.¹⁰⁸ Finally, the judge advocate will be called upon to either prosecute or defend individuals who have been charged with law of war violations.

C. Officers Must Ensure Compliance with the Law of War Through Training and Leadership

As implied throughout this article, the importance of professional conduct on the battlefield extends to the strategic, political, and social realms. The primary responsibility for ensuring this professional conduct falls directly on the officer corps. For this reason, nowhere is the need for law of war training more critical than in the proper development of the military's officer corps. No officer should be given the responsibility of leadership unless he or she possesses two essential qualities: (1) technical proficiency in the profession of arms; and (2) the highest ethical and moral courage. Under the ancient Roman adage that no man can control others until he first can control himself, officers must be prepared and tested thoroughly in both of these areas. Combat command should be offered only to officers who thoroughly have been scrutinized and put through extensive field training exercises designed to test combat pressures.

The primary cause of My Lai unquestionably was the lack of disciplined control—in other words, the lack of any real leadership. Leadership is absolutely essential in preventing law of war violations. The associated tensions set out by the Peers Report were not the real problem at My Lai; tensions of combat always will be present in one form or another. The real problem was that the leaders failed to control those tensions effectively. A soldier facing the stresses of war cannot be expected to temper his actions solely by exercising the level of restraint that commonly is considered self-control. Rather, ensuring that soldiers know how to—and actually are capable of—maintaining self-control under warfighting pressures depends considerably on a commander's training and leadership. Sadly, many of the officers in Charlie Company not only allowed the illegal manifestations of battlefield

¹⁰⁸ DEP'T OF DEFENSE, DIRECTIVE 5100.77, DOD LAW OF WAR PROGRAM (July 1979); Memorandum, Office of the Joint Chiefs of Staff, MJCS 0124-88, subject: Implementation of DOD Law of War Program, (4 Aug. 1988); UNITED STATES CENTRAL COMMAND, CENTCOM REG. 27-1, LEGAL SERVICES: LAW OF WAR PROGRAM (3 Jan. 1989); UNITED STATES CENTRAL COMMAND, CENTCOM REG. 27-25, REPORTING AND DOCUMENTATION OF ALLEGED WAR CRIMES (3 Jan. 1989).

stress to be exhibited by their troops, but also initiated and participated actively in the atrocities—both through the orders they gave and examples they set. Proper officer leadership undoubtedly could have prevented the law of war violations at My Lai. Accordingly, the primary responsibility for these crimes lay with those officers. The function of leadership is to hold up, at all times and at all costs, the professional torch. The officers involved in the incident at My Lai, however, did not merely allow that torch to fall; instead, they actually extinguished its flame before those who depended upon it for enlightenment and guidance.

V. Conclusion

Future My Lai's cannot be prevented unless the answers to the "why?" of My Lai are repeated over and over—that is, until they are inculcated into every warfighter in uniform. Just as Americans must never forget their rallying cries of honor and nobility—"Remember the Alamo"¹⁰⁹—they must be forced to deal with their nightmares—"Remember My Lai." On the other hand, precisely because of its horror and repulsiveness, My Lai is suited uniquely to serve as *the* primary vehicle to address the entire issue of adherence to the law of war, as well as the necessity for effective leadership in the modern era characterized by low intensity conflict environments.

The American military cannot afford to take these lessons lightly. Not surprisingly, with the passing of time, many lessons of history will be forgotten and therefore, many mistakes will be repeated.¹¹⁰ This human reality is particularly unfortunate in light of humanity's continuing efforts at curtailing warfare. Accordingly, the lessons of My Lai not only must be remembered, but also must be inculcated.

¹⁰⁹ See LON TINKLE, *THE ALAMO* (1958). For 13 days in March of 1836, 187 Americans fought off a Mexican Army that outnumbered them by thirty to one. The battle **took** place at the Alamo at San Antonio, Texas. Although all of the Americans could have escaped, they choose to fulfill their duties, even knowing that doing so would mean almost certain death. All died in combat—killing 1600 Mexicans in the process—to buy time for the birth of the Texas Republic. The subsequent battle cry of "Remember the Alamo," was coined by General Sam Houston in the defeat of the same Mexican forces later that year.

¹¹⁰ Many military writers have lamented that basic historical lessons related to combat are not emphasized, even at the nation's military academies. See, e.g., Jeffrey Record, *Our Academies Don't Teach The History of War*, HARPER'S MAG., Apr. 1980, at 26; Jay Luvaas, *Military History: Is it Still Practicable?*, PARAMETERS, Mar. 1982, at 2; T. N. Dupuy, *Practical Value Largely Unappreciated, History and Modern Battle*, ARMY, Nov. 1982, at 18; Jeffrey F. Addicott, *The United States of America: Champion of the New World Order or the Rule of Law?*, 6 FLA. J. INT'L L. 63 (1990).

BOOK REVIEWS

EISENHOWER **AND** THE GERMAN POWS: FACTS AGAINST FALSEHOODS*

REVIEWED BY FRED L. BORCH**

In 1989, Canadian James Bacque “rocked the scholarly community” in charging that General Dwight D. Eisenhower *personally ordered* the mass starvation of German prisoners of war (POWs) at the end of World War II. In his book, *Other Losses*, Bacque claimed that Eisenhower used his power as the head of the Allied occupation intentionally to starve to death “quite likely a million” German POWs held in American-run POW camps. Bacque asserted that Eisenhower hated the Germans, and wanted revenge for the pain and suffering they had inflicted on all Americans and members of the world community.

The gist of Bacque’s theory is that Eisenhower selected as the target of his revenge the nearly four million German soldiers held in Allied camps. Of course, these men could not be shot out right because questions would be asked. Consequently, Eisenhower allegedly ordered that their food rations be reduced, leaving them to die of starvation. The Geneva Convention relating to the treatment of POWs, however, required that POWs receive the same rations as Allied soldiers. Bacque claims that Eisenhower cleverly side-stepped this international treaty by directing the reclassification of German soldiers from their POW status to a new class, called Disarmed Enemy Prisoners (DEFs). Because DEFs did not enjoy any of the POW protections under the Geneva Convention, their captors could feed and house these prisoners under inadequate conditions until they were “casually annihilated.”

Bacque also claimed in *Other Losses* that the United States and French armies were “institutionally” responsible for the POW deaths. Finally, he maintained “that ever since these heinous crimes were committed, professional historians had participated in a vast American conspiracy by failing to uncover the mass

*EISENHOWER AND THE GERMAN POWS: FACTS AGAINST FALSEHOODS, (Guenter Bischof & Stephen Ambrose, eds.) (Louisiana State University Press, 1992); 258 pages; \$24.95 (hardcover).

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deaths." *Other Losses*, Bacque insisted, "set the record straight after a 'long night of lies'."

Bacque's allegations received world-wide attention. *Other Losses* was featured in a British Broadcasting Corporation documentary, and discussed in *Time* magazine, in the *New York Times*, and on network television. The book was a best seller in Germany. *Other Losses* was not available in this country, however, until it finally was published in 1991.¹

In 1990, a group of scholars met at the University of New Orleans to examine Bacque's charges. *Eisenhower and the German POWs: Facts Against Falsehoods* records this group's historical research. The result is a meticulous, yet highly readable, refutation of *Other Losses* and Bacque's claims.

Much of *Eisenhower and the Germans: Facts Against Falsehoods* is devoted to setting the German POW issue in the context of World War II. Germany was "a rubble-strewn wasteland in which the living often envied the dead." The responsibilities of the occupying forces were monumental. The Americans, for example, had anticipated "capturing 3 million German soldiers." The actual number taken prisoner, however, "was as many as 5 million." With even more POWs in British and French hands, the Allies faced a "logistical nightmare" in feeding and caring for not only for their own peoples, but also millions of prisoners. Additionally, the Allies faced some "20 million dislocated civilians from all over Europe," and a "badly demoralized German civilian population." In sum, the virtual collapse of Western Europe's economic and social structure, combined with the requirement to feed unanticipated millions of hungry mouths, raised the likelihood of famine in the winter of 1945 to 1946.

The decision to reclassify the German POWs as DEFs was founded on the reasoning of Eisenhower's civilian superiors, who decided that feeding German POWs better than refugees, dislocated persons, and civilians was wrong. This was a sound policy decision—not some sinister "Eisenhower conspiracy" to kill defenseless POWs. More importantly, because the decision to effect this reclassification was made by Eisenhower's political superiors, the argument that Eisenhower's evil motive was the impetus for the change is unconvincing.

Bacque further alleged that German POWs were mistreated, and that unnecessary suffering and death occurred in the

¹See Fred L. Borch, *Book Review*, 135 MIL. L. REV. 198 (1992) (reviewing JAMES BACQUE, *OTHER LOSSES* (1991)).

American and French-run POW camps. Although his allegations are correct, any maltreatment resulted from individual misconduct—not from some institutional plan to punish German captives. Significantly, *Eisenhower and the German POWs: Facts Against Falsehoods* does not excuse illegal and immoral American behavior. The book acknowledges that many American soldiers, seeing the “gruesome reality” of Dachau and other evidence of Hitler’s “Final Solution,” often shared a “deep sense of anger.” Many Jewish officers and enlisted men administering the POW camps also harbored a low regard for the Germans generally, and saw the opportunity for “revenge.” These manifestations of anger, like the desire for revenge, did not excuse the Americans from their mistreating German POWs. Nevertheless, they offer some explanation for what individual American soldiers occasionally did to German POWs.

Bacque claimed in *Other Losses* that “quite likely a million” German POWs starved to death in American administered POW camps. *Eisenhower and the German POWs: Facts Against Falsehoods*, however, shows conclusively that this claim is totally false. German POWs did die in the camps, and certainly some of the deaths could have been prevented. The number of those who perished in American camps, however, appears to be “about 56,000”—a much smaller figure than Bacque alleges. Although these deaths may be called a tragedy, they were not the result of Eisenhower’s murderous revenge. For one man to have orchestrated the death of a million men without the help of others almost certainly would have been impossible. Moreover, absolutely no evidence exists of any conspiracy. Bacque fails to provide any physical evidence—or even theories—to corroborate his claim, such as hypotheses on the locations of mass burial sites, or individual graves.

Eisenhower and the German POWs: Facts Against Falsehoods is the definitive refutation of Bacque’s “trumped-up allegations.” Bacque “misinterpreted documents [and] neglected important evidence to the contrary of his theories.” He sullied the reputation of a “genuine American hero.” In unravelling and then destroying Bacque’s theories, *Eisenhower and the German POWs: Facts Against Falsehoods* does as much as any book can to reveal the truth.

THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT*

REVIEWED BY JOHN J. PARK, JR.**

Are lawsuits good? If one lawsuit is good, does each additional lawsuit produce the same amount of good, or does a point of diminishing marginal returns exist? Or, as Walter Olson put it, ("Why do Americans spend so much time and money fighting each other in court?"¹

Clearly, and nonpejoratively, a litigation industry has emerged in the United States—one that apparently is much larger and more aggressive than parallel industries in other countries. Walter Olson, a senior fellow at the Manhattan Institute², notes that a number of changes in legal ethics and procedural and substantive laws, which have occurred in the last thirty to fifty years, have removed restraints that formerly held litigation in check. The result of each change, the interaction between them, and the working out of their individual and collective logics have produced or contributed to a litigation explosion. These changes have increased the ease of filing suit, conducting invasive discovery, and maintaining and transforming a suit; the same changes correspondingly have increased the difficulty in disposing of lawsuits. Olson concludes, "The experiment [in deregulating litigation] has been a disaster, an unmitigated failure. The unleashing of litigation in its full fury has done cruel, grave harm and little lasting good."³

Olson breaks recent legal history into two periods: an idyllic past and a litigious present. Olson's watershed events include the Legal Realism movement of the 1920s and 1930s and the publication of the Federal Rules of Civil Procedure, which became

*WALTER K. OLSON, *THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT* (Dutton 1991); 416 pages; \$24.95 (hardcover); \$13.00 (paperback).

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¹See PETER HUBER, *GALILEO'S REVENGE: JUNK SCIENCE IN THE COURTROOM* (1991); see also Fred L. Borch, Book Review, 135 MIL. L. REV. 192 (1992) (reviewing *id.*).

²OLSON, *supra* note *, at 1.

³*Id.* at 2.

effective in 1938. Younger lawyers may be unable to judge the validity of this breakdown, not having practiced in any period other than the recent past when the Federal Rules of Civil Procedure have governed litigation and lawyer advertising has governed the marketplace. Even so, younger lawyers should be struck by the number of calls to civility in the bar. Those calls appear to issue most often from older lawyers, indicating that something has been lost with the passage of time.

In Olson's view, the increased use of contingency fees and class actions, and the removal of ethical restrictions on lawyer advertising and solicitation have shifted the focus of the attorney-client relationship in litigation matters to the lawyer. The contingency fee arrangement gives the lawyer a direct stake in the magnitude of any recovery. The class action separates the attorney from the putative clients—a separation that shows the degree to which the representative nature of class representatives has diminished. Olson also suggests that loosening the bans on lawyer advertising and solicitation actually has hampered society's ability to protect itself from incompetent lawyers. Certainly, citizens may be better informed about their rights and the availability of legal remedies as a result of such loosening, but we now largely lack any institutional means for shutting off the control of information.⁴ All of these changes mean that more potential plaintiffs are available to sue more potential defendants, with more lawyers seeking to offer litigation services.

Procedurally and substantively, lawsuits have become easier to file in home forums and easier to maintain. Olson notes that the enactment of Federal Rules of Civil Procedure in 1938 reduced the complexity and detail required in a complaint and permitted discovery to reshape a case even after it has been filed. He points out the way in which personal jurisdiction largely has disappeared as a protection for defendants; the "tacit consent" theory was jettisoned in favor of the "minimum contacts" test, which has itself been swallowed-up by long-arm tests. In particular, Olson notes the prevailing practice that allows a court to assume jurisdiction under all circumstances except when exercising jurisdiction would violate due process. He asserts that, if that test is not a self-fulfilling prophesy, it comes very close. He also observes that courts which have been aggressive in acquiring

⁴For example, the transaction costs of filing a simple bankruptcy often are disclosed in lawyer advertising. Obviously, the public has become aware of the availability of bankruptcy relief, and the bankruptcy courts have been swamped. Does a causal link between the flow of information and the destigmatization of bankruptcy exist? Was society better off without swamped bankruptcy courts, when bankruptcy carried social stigma with it?

jurisdiction are rarely shy in applying their own laws. The application of liberal tests for jurisdiction and choice of law produces a beggar-thy-neighbor result, with defenses applicable in one state being disregarded in others. Courts in one state judge behavior according to one standard, while neighboring states apply a different one. A corporate defendant sued in more than one state for the same conduct is forced by litigation to conform its conduct to the most demanding standard, without regard to the wisdom of regulating behavior at a less demanding level.

Substantively, Olson points out that the law has moved from fairly clear rules to inexact balancing tests, which make predicting a result almost impossible. Personal jurisdiction and choice of law are determined by reference to numerous criteria, none of which are dispositive. He also offers examples, such as one court that set forth a twenty-factor test for determining whether a property settlement is alimony or support. The shift to vague standards and balancing tests actually produces more disputes because each party believes it has a chance of winning and because both fighting and winning have financial impacts that each party is willing to use to its advantage. Olson agrees that clear rules may cause injustice—real or perceived—in individual cases, but he and others observe that clear rules preempt litigation to resolve disputes.

Whether the financial resources expended in litigating disputes are expended wisely is another question. Olson characterizes the theory of the litigation industry as an “invisible fist” theory, producing good where it is wielded.

Litigation, [its proponents] argued, precisely because of its painful sharpness, is a fine way to drill beneath the surface of human affairs to the wellsprings of limpid truth. Where else under our system of government, short perhaps of the legislative investigating power, can investigators demand access to private correspondence and compel persons to testify against their own interests under threat of penalty? Surely with such resources lawyers could turn courts into a supreme tribunal of disinterested inquiry. They could uncover social evils of tremendous importance and take the lead in alerting the public to the dangerous aircraft design, the unethical homebuilder or cheeseparing tradesperson, the irresponsible ex-spouse or neglectful parent.⁵

⁵OLSON, *supra*, note *, at 176

Olson contends, however, that the theory does not work out in practice. Defendants who are sued often may view the results of trials as random events that provide no guidance. If the manufacturer of a drug like Bendectin wins ten suits and suffers a big loss in the eleventh, is the drug bad? The drug may be pulled off the market, but its removal may be motivated by the perception that a random result was intolerable—not necessarily because the drug has been shown to represent a safety problem. So too, malpractice verdicts against doctors and complaints regarding defects in particular automobile models may not tell consumers much because such verdicts and complaints have become nearly universal. Unfortunately, they affect lives in other ways—namely, competent doctors refuse to perform services in certain places, otherwise useful products are pulled from the market, and fruitful transactions become more and more complex.

The government, and government attorneys, are not immune from the litigation explosion. Congress has waived sovereign immunity in a number of areas, and has provided for fee-shifting in some cases. For example, the Equal Access to Justice Act permits recovery of fees in some cases in which the claimant prevails and the government's position is not substantially justified. Offering a recovery produces the demand for it, causing both claimants and respondents to expend resources disputing entitlement and quantum. The government's new-found vulnerability to fines and penalties related to environmental violations at its own facilities will subject those facilities to a wide variety of environmental standards. Government facilities likely will find themselves the target of environmental enforcement actions; the government is a deep pocket and an easy target because it presents a multitude of targeting opportunities.

If the litigation explosion does not produce the benefits promised by the "invisible fist" theory, should the explosion be allowed to continue expanding, spreading dust and debris as it does? Olson contends that the litigious impulse of the American people should be reined in. He views the stiffening of Federal Rule of Civil Procedure 11 as one favorable development, but espouses fee-shifting on English and European lines as the solution. Such fee-shifting would require losing parties to pay winning parties, but would be stingy with payments by not returning a total recovery. Olson believes the prospect that a plaintiff may be responsible for the defendant's attorneys' fees will deter lawsuits, especially those having a limited likelihood of success on the merits.

Olson's work is a persuasive description of the litigation explosion; the changes in the American legal system that he describes inevitably have led to additional litigation. Actually, between the Civil Rights Act of 1991, the Americans with Disabilities Act, and the recent Supreme Court decision in *Cipollone v. Liggett Group, Inc.*,⁶ Congress and the Supreme Court may have created room for yet more litigation. While Olson is not a lawyer, his explanation of trends, as well as his marshalling of evidence in the form of court decisions, produces a cogent, very readable text.

Olson's work is provocative, and he would recognize that the organized bar does not like his proposed solution. The bar, like other professions, is not especially introspective and sometimes suffers from a guild mentality, favoring the status quo and tolerating change only if it promises to bring new work. Many in the bar have not been receptive to critics.⁷ An instinctively hostile and defensive response to criticism—particularly conservative criticism—does the bar little credit even when the response may have validity. The bar would bring itself much more credit by taking the lead and considering how to answer the questions Olson asks. What benefits do society, lawyers, and the parties derive from the time and money Americans spend fighting each other in court? Are those benefits to the litigants, attorneys, and society worth the costs to the rest of society?

⁶112 S. Ct. 2608 (1992). The Supreme Court held that the federal cigarette labeling and advertising statutes preempt some, but not all, state-law damage claims. The Court thereby opened the door to lawsuits against the cigarette manufacturers involving the nonpreempted claims. The open door apparently represented a Pyrrhic victory on the part of the *Cipollone* plaintiffs, who since have dismissed the lawsuit. Separate opinions by Justice Blackmun and Justice Scalia pointed to the prospect of future litigation. See *id.* at 2620 ("I can only speculate as to the difficulty lower courts will encounter in attempting to implement [today's] decision") (Blackmun, J. concurring in part, dissenting in part); *Id.* at 2625 ("These and other questions raised by today's decision will fill the law-books for years to come. A disposition that raises more questions than it answers does not serve the country well") (Scalia, J., dissenting).

⁷At the 1991 ABA annual convention, then-Vice President Quayle delivered a speech to the ABA House of Delegates criticizing the effect of litigation on American competition, among other things. The then-outgoing ABA President, John Curtin, delivered an apparently prepared rebuttal, to which Vice President Quayle responded. Curtin responded, "Some thought that Quayle got what he deserved, while others believe that Curtin was disrespectful, if now downright rude." See Hansen, *Quayle Raps Lawyers*, 77 A.B.A. J. 36 (1991).

I COULD NEVER BE SO LUCKY AGAIN*

REVIEWED BY FRED L. BORCH**

My father said, "Read autobiography because if the author tells the truth the book is valuable."

—Colonel Red Reeder

Autobiographies offer the '(chance to enter and inhabit the real world of another person, the chance to try on another identity and so broaden our own.'

—Jill Ker Conway

Anyone who reads General Jimmy Doolittle's *I Could Never Be So Lucky Again* will understand what Colonel Reeder and Ms. Conway said about autobiographies. First-hand accounts of life and living do offer valuable insights and new perspectives. *I Could Never Be So Lucky Again* is no exception. James Harold Doolittle is a great American, and his autobiography details a truly amazing, full and rich life.

Born in 1896, Jimmy Doolittle spent his childhood in Nome, Alaska. His father, an excellent carpenter, had gone to Nome as part of the Alaskan gold rush. The Doolittle family, however, stayed in Nome long after many prospectors had departed—at least in part because Nome was "one of the few places where a skilled carpenter could make a dollar an hour." The going rate in the rest of the United States was about twenty-five cents an hour.

Doolittle was smaller and shorter than other children. In the rough and tumble schools of Nome, the bigger and taller boys constantly teased and picked on him. Doolittle fought back. He "discovered it was easy to draw blood if you were nimble on your feet, aimed at a fellow's nose, and got your licks in early." He was such a natural fighter that he won the 1912 West Coast Amateur Championship as a flyweight—105 pounds—at age fifteen. Later, he boxed in college, knocking out an archrival from Stanford in eighty-three seconds. Prize-fighting also was a source of money. He boxed professionally as a teenager under the name Jimmy Pierce.

*JAMES H. DOOLITTLE & CARROLL V. GLINES, *I COULD NEVER BE SO LUCKY AGAIN* (Bantam Books 1991); 574 pages; \$24.95.

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Doolittle and his mother had left Alaska to settle in Los Angeles in 1908. He continued to box, and he liked it. Nevertheless, he always wanted to fly. At age fifteen, Jimmy Doolittle built a hang glider, and tried constructing a monoplane using bicycle wheels and a motorcycle engine. Not surprisingly, when America entered World War I, Doolittle dropped out of the School of Mines at the University of California at Berkeley to join the Aviation Section of the Army Signal Enlisted Reserve Corps. This was the beginning of his incredible career as a pilot and aeronautical engineer.

By the time he completed pilot training, World War I was over. Lieutenant Doolittle, however, "publicized the fledgling Army Air Corps with his hair-raising stunt-flying escapades." He entered and won a phenomenal number of prestigious air shows, setting various air speed records. Doolittle was a consummate risk taker, always challenging conventional ideas about flying. He won the Mackay, Harmon, and Bendix aviation trophies. He was the first top-notch pilot to understand that the future of aviation depended on combining flying skills with a knowledge of aeronautics. Consequently, he enrolled at the Massachusetts Institute of Technology (MIT) in 1923 to earn a masters degree in aeronautical engineering. Doolittle offers the following explanation of just how primitive aviation engineering was in the early days of manned flight:

One of the mysteries of flight in those days was how much stress an airplane could take before it fell apart. ... [M]easurements of how much an aircraft could take before it self-destructed had been done on the ground by placing sandbags on the wings and horizontal stabilizers until they broke from the weight.

When aircraft were built, they received a "safety factor number" based on the weight of the sandbags placed on the wings. For example, a safety factor of eight meant that a plane "would take weights [or G-forces] eight times the weight of the aircraft before failure would occur." Doolittle suspected, however, that aircraft structural failure related less to sandbag weight on wings and more to acceleration and velocity—particularly when coming out of a dive. His practical experience and advanced education made him ideally suited to perform practical, scientific tests in this area; after performing these tests, he discovered that his suspicions were correct. His published thesis on the subject was acclaimed. Doolittle stayed at MIT after completing his masters degree and, in 1925, earned one of the first doctorate degrees awarded in aeronautical science. When Jimmy Doolittle

left the Army Air Corps for a job at Shell Oil in 1930, he was famous in the aviation community.

At the outbreak of World War II, Doolittle was in his forties, and a major in the Army Air Corps Reserve. He feared he might be too old to fight. Nevertheless, he was called to active duty. He then organized and led the famous air raid over Tokyo in 1942, earning the Medal of Honor for heroism. Promoted to general, he later commanded the Eighth, Twelfth, and Fifteenth Air Forces in North Africa and Europe. After World War II, Doolittle left active duty and returned to Shell Oil. He stayed in the Reserves, however, reaching four-star rank in 1985.

Judge advocates will find interesting Doolittle's discussion of his work as the chair of the "Board on Officer/Enlisted Man Relationships." This committee, also known as the "G.I. Gripe Board," eventually proposed some radical changes. Doolittle and all of the members of this board had served in the enlisted ranks. Not surprisingly, they made recommendations that "aroused the ire of Army regular officers." One proposal included abolishing the hand salute "off duty and off Army installations." Another recommended an end to "all statutes, regulations, customs, and traditions which discourage or forbid social association of soldiers of similar likes and tastes, because of military rank"—an end to fraternization as it then was known.

Most of *I Could Never Be So Lucky Again* covers Jimmy Doolittle's early life through World War II. He spends little time detailing his life over the last forty years. Nevertheless, this is not a shortcoming because his childhood and early adventures as an aviation pioneer were the shaping forces in his life.

Those looking for solid historical scholarship, however, will not find it in this autobiography. Although Doolittle's writing is clear, concise, fresh, and always entertaining, it is replete with anecdotes and memories. Doolittle stresses the good in everyone. Consequently, he avoids discussing controversial episodes in his life, such as his initial personality clash with Eisenhower, or MacArthur's dislike of him. Similarly, the men and women about whom Doolittle writes are not fully revealed. Perhaps the book would have been better had the author been more candid in his appraisal of others.

As an insight into the forces that shape a man or a woman, this autobiography is one of the best. Doolittle emerges as a warm and charming, yet rugged individualist. He is not like other men. Rather, he seems to be one of those rare individuals who repeatedly questions and challenges conventional ideas and

beliefs. In the early years of aviation, this was just the type of person who succeeded. He was lucky, too, as he readily admits.

I Could Never Be So Lucky Again is a fine account of an incredible life in uniform. All who read this autobiography will greatly enjoy it.

FOLLOW ME 11: MORE ON THE HUMAN ELEMENT IN LEADERSHIP*

REVIEWED BY FRED L. BORCH**

What makes a man or woman a good leader? Is a person "born" to be a leader or can leadership be learned? *Follow Me 11: More on the Human Element in Leadership* examines these questions with clarity, wit, and common sense. What sets this work apart from most books on leadership, however, is its focus on *how* to lead. The book contains no theoretical discussion of personnel management or leadership principles. Rather, "recollections, anecdotes and incidents" offer practical tips for the reader to follow.

The title of the book refers to an event in author Aubrey S. Newman's military career. On October 24, 1944, then-Colonel "Red" Newman was the regimental commander of the 34th Infantry. He and his men were part of "an immense amphibious force" landing at Leyte, The Philippines. The 34th Infantry was one of six regiments taking part in this assault from the sea. It landed at "Red Beach" along with the 19th Infantry. To the north, elements of the 1st Cavalry Division landed at "White Beach." This was the beginning of General Douglas MacArthur's promised "return" to the Philippines. Colonel Newman's infantry unit came ashore. Its lead companies, however, immediately were "pinned down by withering Japanese fire." The men lay glued to the beach, and refused to advance—particularly after a company commander who tried to move forward was shot through the head.

Colonel Newman waded ashore in the fourth assault wave, and discovered the 34th Infantry was not moving. The officers

*AUBREY S. NEWMAN, *FOLLOW ME 11: MORE ON THE HUMAN ELEMENT IN LEADERSHIP* (Presidio Press 1992); 267 pages; \$25.00 (hardcover).

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and noncommissioned officers had lost control. Realizing that "their only hope was to clear the beach immediately and press inland," Newman stood up and shouted, "Get the hell off the beach! God damn it, get up and get moving—Follow Me!" He then stepped over the body of the dead company commander, and began to move forward. The soldiers of the 34th Infantry Regiment responded. They followed their leader, and secured their portion of the beachhead. The liberation of the Philippines was off to a success. Newman's heroism later became the subject of a famous "Army in Action" painting and poster. He went on to become a successful general officer, retiring as a Major General in 1960.

The physical courage sometimes needed by a leader, however, is not what *Follow Me II* is all about. Rather, as the title also suggests, the key to leadership is understanding human nature. General Newman does not propose any general theory of leadership. He sees it as an art, not a science. Consequently, "[t]he techniques of leadership should fit the individual leader and the particular situation." Leadership knows no absolutes; no amount of reading or instruction can substitute for experience because experience helps each person find and adopt the leadership techniques that work best for him or her. In sum, leadership is more a matter of the right techniques rather than any set of leadership principles.

Not surprisingly, *Follow Me II* offers no ironclad commandments or rules for leading. Rather, "Red" Newman offers a learning short cut to all readers who want to be good leaders. He does this by recollecting true incidents and events from his life in uniform to illustrate each particular leadership lesson. In *Follow Me II*, he writes first about leadership at the grassroots or company level. Second, he explores "principles for all levels of command." Finally, he talks about leadership in combat. Regardless of his subject, however, General Newman returns time and again to his common theme—that is, although the technology used by an organization and the ways of running it may change with the passing of years, what motivates men and women to excel in peace and war remains constant. This is the human element, which remains basically unchanged from generation to generation. Newman asserts that the factors that made our grandparents and parents happy, angry, frustrated, or sad have basically the same effect on us. That also means that the motivations that made a man or woman want to do his or her best at a job fifty years ago still exist today, and will be basically the same fifty years from now. Following are some examples of General Newman's thoughts on leadership that always will be relevant:

- Leadership is the art of inspiring a desire in men's hearts to do what you want them to do; command is the knack of making them do what you want them to do. ... [W]hen properly synchronized they often blend one into the other to get the job done up to the highest standards.

- The armed services rest on a foundation of discipline—which is not the disagreeable thing many civilians visualize, nor is it hard to understand. Discipline is the willing obedience to all orders and, in the absence of orders, to what you think those orders would have been.

- The same things that make fine soldiers make successful civilians, including good character and good habits, sense of responsibility, getting along with others, good judgment, and the continuing will to strive. Military service has an intangible something to offer any man—regardless of what career he may later follow—but you have to reach for it.

- All successful men need human understanding—the ability to understand people and what makes them do what they do. Military service offers an unparalleled opportunity to cultivate this quality and learn to get along with others, as important in civilian life as in the Army.

- Officers are soldiers, too, and before any man can be a good officer he must first be a good soldier.

The techniques of leadership in *Follow Me II* are sound because they reflect an understanding of human nature. Consequently, the book's value is not limited to men and women in uniform. Those who would be leaders in business, industry, sports, and even entertainment can learn how better to focus the energies of employees, co-workers, and teammates to achieve a common purpose. After all, "the human element and basic principles are the same everywhere."

Follow Me II is exceptionally well written. Each of the fifty-one chapters is self-contained, and need not be read in any particular order. This is because most have appeared previously in "The Forward Edge," a column that General Newman wrote for some twenty years for *Army* magazine. No chapter is more than ten pages. Consequently, any reader can pick up *Follow Me II* for a few minutes and get much enjoyment from its pages. Anyone who is in charge of people should read this fine book.

NAVIGATING THE YELLOW STREAM*

REVIEWED BY KEITH A. MANSON**

In a book review recently published in the *Military Law Review*, Fred L. Borch described *Drug and Alcohol Testing: Advising the Employer*¹, as a “practical nuts-and-bolts guide for the practitioner”² of limited use to active duty military lawyers. Specifically, the book was not tremendously helpful to military legal practitioners because the government generally provides the military lawyer with substantial training on drug testing in the military justice system. But where does the lay service member get information on drug testing? Often, he or she will read about it in “pop culture” material, such as *Navigating The Yellow Stream*. The military lawyer will find this book entertaining, but not legally informative. Most importantly, the military practitioner who reads *Navigating the Yellow Stream* will understand where the average service member gets his or her often-misconstrued information. The material in the book generally provides insight into how and why a soldier or sailor would attempt to beat a drug test.

On its face, *Navigating the Yellow Stream* appears to be trivial and diminutive, making it almost immediately susceptible to a reader’s dismissing it as mindless counter-culture trash, devoid of any academic credibility. Nevertheless, this author was prompted to examine a copy of the book after learning of two petty officers who discussed methods of “masking” drug usage, which they had discovered in *Navigating The Yellow Stream*.

Apparently, the book has gained some notoriety among Navy personnel. This reviewer was surprised to learn, however, that the book essentially praises the military for its efficient and consistent methods of taking urine samples and for its reputation of accuracy in lab testing. The author actually points to the military as the model for running a fair and effective drug testing

*PAUL CRUMRINE, *NAVIGATING THE YELLOW STREAM* (Nest Egg 1991).

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¹See Fred L. Borch, *Book Review*, 136 MIL. L. REV. 180 (1992) (reviewing WILLIAM D. TURKULA, *DRUG AND ALCOHOL TESTING: ADVISING THE EMPLOYER* (1990)).

²*Id.*

program. The author believes keys to an effective program are (1) observing the collection of the sample from the body; (2) proper sealing and identification of the sample; (3) documentation of the chain of custody; (4) testing for specific substances known to the individual tested; (5) proper scientific testing and; (6) proper documentation of the test results.

Notwithstanding his acknowledgement that the military's drug testing system is well administered, the author's main contention in *Navigating the Yellow Stream* is that drug testing nevertheless is indignant, disgusting, and sometimes unfair. To support his assertions, the author provides an anthology of drug testing stories by individuals who claim to have "beaten the system" and by others who have gotten caught. These stories include accounts by employees in civilian working environments and by members of the military services.

The author supports his assertion that urinalysis testing is an indignant process, by telling the story of an Air Force Reserve Officer Training Corps candidate who claimed to be so nervous that, even after drinking a pot of coffee, he still could not urinate. Specifically, the candidate asserted that he could not release because he simply was very embarrassed. Manson explains that the reason for the candidate's embarrassment should have been obvious—the observer was a female technical sergeant.

To support his claim that drug testing is disgusting, the author offers a series of stories about slips, trips, and spills. He tells of one soldier who had his own method of protesting the drug testing program—that was to spill some of the sample down the side of the container, so his sergeant would get his hands soiled. Occasionally, the sergeant would toss the sample rather than process it.

To bolster his charges that drug testing is unfair, the author complains that some drug users are able to circumvent the system, while a few innocent people are fired or, even worse, criminally prosecuted. Manson relates the story of an Air Force corporal who claimed to use marijuana frequently, but never tested positive in a drug test. On the other hand, the author offers the testimonials of people who were fired or prosecuted after just one incident of use or in spite of their claiming that they tested positive only because of accidental exposure. Manson describes one case of accidental exposure involving a bus load of Navy recruits on their way to the Great Lakes Recruit Training Center (RTC), all of whom tested positive for opiates. The investigators were convinced they all had used drugs during one

last party prior to entering boot camp. The commander of RTC Great Lakes refused to believe this, and conducted his own investigation. His investigation found that the bus had made a stop at a restaurant that served all of its sandwiches on poppy seed buns. The commander concluded that the ingestion of the poppy seeds—not drugs—caused false positive test results.

Interestingly, the author disfavors the use of masking agents, referring to those who use them as common liars. The author describes many of the “old wives tales” of consuming herbal tea, large quantities of water, and vinegar to “mask” drug use. One story describes a military school cadet who tested positive, and was to be tested again the next day. Although the cadet attempted to mask the results of the second test by drinking a large bottle of vinegar, the subsequent test also resulted in a positive reading. Nevertheless, Manson professes that some masking products may work. One such product is the health food herb, “golden seal root.” The author also cites two commercially packaged products: “Test Free,” which costs **\$37.66**, and “Test Clean,” which sells for **\$34.95**. Ironically, both of these products come with a money back guarantee; if you fail your test they will make a full refund. The author however, gives no statistical data on the effectiveness of these products.

The problem with the book in general, is that the author presents no scientific data or even a statistical survey to back up his claims of an unjust process. The book essentially serves as a vehicle for the author to vent his disgust for urinalysis drug testing. Perhaps its only redeeming quality is that *Navigating the Yellow Stream* is such an outrageous work that it is hilariously entertaining. Nevertheless, even though it certainly provides no legal information to the military practitioner, it does provide some insight into the cultural influences and misinformation that appear in contemporary literature—literature to which service members often are subjected and, unfortunately, too often are receptive.

TRIAL PRACTICE"

REVIEWED BY FRED L. BORCH**

Every judge advocate must know how to try a case. Even if he or she is not prosecuting or defending at courts-martial, representing soldier clientele at administrative boards, or appearing on behalf of the United States in civil proceedings, a judge advocate still must supervise other lawyers who are doing so. In sum, good courtroom skills are basic to any practice of military law.

The best way to learn how to try a case is to try real cases. The next best way to develop courtroom expertise is to "practice" trial skills in a trial advocacy program. Any military lawyer wanting to sharpen courtroom skills, and any supervisor looking for ways to develop trial skills should read *Trial Practice*.

Law professors Lawrence Dubin and Thomas Guernsey have authored a book that is not cluttered with theoretical concepts and academic jargon. Instead, the prose in *Trial Practice* is refreshingly clear, crisp, and concise; it focuses exclusively on the "nuts-and-bolts" of trying a case.

In their introduction, the authors correctly stress that success in court requires that witnesses, exhibits, and all other aspects of a case be organized around a theme or theory.

Each of the subparts of the trial is designed to persuade the fact-finder that your client should prevail. In a sense, you are presenting a story. To be persuasive, however, you must structure this story around a unifying theory. The theory should reconcile both the law and the facts into a consistent, logical, interesting and believable narrative.

The theory of the case "provides the guideposts for the trial itself." Accordingly, every question asked of a witness must be consistent with the theory of the case. Furthermore, every document offered into evidence must advance this theory.

Each chapter of *Trial Practice* focuses on the subparts of a trial. The first three chapters are about evidence and objections,

*LAWRENCE A. DUBIN & THOMAS F. GUERNSEY, *TRIAL PRACTICE* (Anderson Publishing Co. 1991); 200 pages.

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jury selection, and opening statements. Direct examination, exhibits, cross-examination, impeachment, and expert testimony follow. The book concludes with a chapter on closing argument.

Whether discussing jury selection, direct examination, or closing argument, *Trial Practice* always first emphasizes the purpose or goal of each phase of trial. For example, the authors state that any opening statement must “grab the jury’s attention [and] assert the theory of the case.” Questions asked a witness on direct must be “consistent with the theory of the case, understood, believed, and interesting.” The goals of cross-examination are to “develop facts consistent with the theory of your case, discredit the testimony of the witness, and discredit the witness.” Because the book thoroughly explains the goals of each subpart of the trial, the practical guidance—how to lay a foundation for an exhibit, how to use expert testimony, or how to make a good closing argument—is set out with exceptional clarity.

The principal value of *Trial Practice* is that its authors really understand that, although a “trial is a planned event,” it need not be boring, tedious, or mechanical in its presentation. Instead, it can be dynamic and exciting and *Trial Practice* shows just how to make it that way. Anyone who wants to be a better trial advocate, or is looking for excellent ideas on how to teach others to be a better representative of the client at courts and boards, should read this excellent book.

THUNDERBOLT: GENERAL CREIGHTON ABRAMS AND THE ARMY OF HIS TIMES*

REVIEWED BY FRED L. BORCH**

General George S. Patton called Creighton Abrams “the world’s champion” tank commander. Charging ahead in his tank as a part of Patton’s Third Army, he received two distinguished service crosses, two silver stars, and a battlefield promotion to colonel. He was much more, however, than a battlefield commander. His strength of character combined with a profes-

*LEWIS SORLEY, *THUNDERBOLT: GENERAL CREIGHTON ABRAMS AND THE ARMY OF HIS TIMES* (Simon and Schuster 1992); 429 pages; \$25.00 (hardcover).

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sional competence and organizational ability to bring assignments of increasing responsibility and stature. During the war in Korea, he was a corps chief of staff. The Berlin Crisis found him commanding the famous 3d Armored Division. He then worked directly with President John F. Kennedy and Attorney General Robert F. Kennedy to implement the military "backup" of federal civil rights activities. Finally, then-General Abrams commanded all United States forces in Vietnam, and followed Westmoreland as Army Chief of Staff. His nearly forty years in uniform saw the transformation of a pre-World War I Army of horses and men into a large standing Army ready to fight the Cold War. Consequently, *Thunderbolt: General Creighton Abrams and the Army of His Times*, is much more than a biography. In recounting the life of a great warrior, author Lewis Sorley also tells the story behind the creation of today's Army.

Born in September 1914, Creighton Abrams grew up in western Massachusetts. His father was a mechanic for the Boston and Albany Railroad, and "the family lived a very modest existence." His father and mother, determined "to be the best regular people we can," instilled a sense of purpose in their son. Young Creighton was high-school class president, editor of the student paper, class orator, and president of the honor society. He also was an outstanding athlete. As captain of the 1931 championship football team, Abrams and his teammates were "undefeated, untied, and unscored upon while themselves averaging more than twenty-six points a game."

Abrams won a scholarship to Brown University when he was a senior in high school. His parents, however, did not have the money for the books and additional expenses needed to send their son to Brown. After hearing about West Point, Abrams took the Academy's entrance exam, passed it, and secured an appointment. When he arrived there in the summer of 1932, it was the first time he had been outside Massachusetts.

When he graduated from West Point in 1936, Second Lieutenant Abrams selected the cavalry, and a life of horses. He quickly discovered that the future was armor and transferred to a tank unit. The rest became history. In Europe, his 37th Tank Battalion spearheaded Patton's sweep across France. Then Lieutenant Colonel Abrams often rode at the front in "Thunderbolt," with its distinctive three bolts of red lightning on its hull. Pre-World War II doctrine was that, "as a rule, tanks are employed to assist the advance of infantry foot troops," but Abrams and others saw that a "new and radically different doctrine" must guide armored combat. The result was the "task

force”—a combination of “tanks, armored infantry, artillery, tank destroyers, engineers, and whatever else was needed” to win in a specific tactical situation. Lieutenant Colonel Abrams and his colleagues were directly responsible for this revolution in American tank doctrine.

After World War II, Abrams served as the head of the Tactics Department at Fort Knox, Kentucky; later returned to Germany; and then went to Korea as a corps chief of staff. He was in Germany during the Berlin Crisis, in command of the 3d Armored Division. *Time* magazine featured then-Major General Abrams in a cover story. “Abrams,” said a *Time* correspondent, “was not an Army politician. ... His idea of how to get ahead is to do the best possible job on the assignment he has at the moment. ... Right now he wants to be the best goddamn division commander in the United States Army.”

General Abrams later worked as Assistant Deputy Chief of Staff for Operations for Civil Affairs. He was on the scene for a number of civil rights conflicts in the South—most notably the federal troop backup of James Meredith’s enrollment at the University of Mississippi. General Abrams subsequently took over from Westmoreland in Vietnam, commanding all United States forces in Southeast Asia from 1968 to 1972. He oversaw not only the invasion of Laos and the 1972 Easter offensive, but also the withdrawal of American troops. Finally, he succeeded Westmoreland as Army Chief of Staff. An untimely death in 1974 ended his career in uniform.

The writing in *Thunderbolt* is clear, crisp, and readable. Consequently, Creighton Abrams emerges as a three-dimensional man who loved the Army and its people as much as he loved his wife and six children. Abrams’s decision-making as an officer always was directed at doing what was right for the Army, regardless of the consequences on his own career. Author Lewis Sorley focuses on a number of ethical challenges faced by Abrams in his career, and judge advocates will want to read how Abrams handled them.

Abrams’s insistence on the highest of ethics clearly contributed to his greatness as a leader. He had the ability to inspire in his subordinates a desire to do their best. In a talk given before leaving the command of V Corps, General Abrams “stressed the transmission of values, the responsibility of senior officers for doing that, and his concern with how this responsibility was being met.” He went on to say the following:

I believe that these special aspects of the leadership, guidance and training of our young leaders

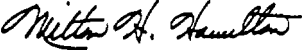
frequently become lost or overshadowed by our routine cares and problems. The business of cultivation and development begins with our own self-examination. If we are honestly and sincerely discharging our duties as commanders ... we cannot help but be contributing to the fundamental and healthy motivation of our junior officers. It is mandatory that we seriously concern ourselves with their careers, to include their morale, the welfare of themselves and their families, their attitudes and their thoughts, and their developmental problems. ... It should be a work of love and from the heart.

*Thunderbolt: General Creighton Abrams and the Army of **His** Times* is a superb biography about one of the architects of the modern Army. It is a great book about a great soldier and the international and national events that shaped his world. Its real value, however, is that its focus on leadership and integrity make it "[a] book that must be read—and not just by soldiers."

By Order of the Secretary of the Army:

GORDON R. SULLIVAN
General, United States Army
Chief of Staff

Official:


MILTON H. HAMILTON
Administrative Assistant to the
Secretary of the Army

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